Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 324.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF NEBRASKA, EX REL. THE CITY OF OMAHA, DEFENDANT IN ERROR.

BRIEF AND POINTS FOR PLAINTIFF IN ERROR.

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Gibbs Print., 17 and 19 Murray Street, N. Y.

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vs.

THE STATE OF NEBRASKA, EX REL., THE CITY OF OMAHA, DEFENDANT IN ERROR.

BRIEF AND POINTS FOR PLAINTIFF IN ERROR.

Statement of Case.

The Omaha & Southwestern Railroad Company was incorporated in 1869 under the provisions of Chapter 25, Revised Statutes of Nebraska, 1866, and immediately constructed its line from Omaha southwesterly through Douglas and Sarpy counties to a point near the Platte river in the county last named and operated it until 1871, when, by lease for 999 years, it transferred all its property and franchises to the Burlington & Missouri River Railroad Company in Nebraska, a corporation then existing under the laws of said state. The last named company operated the road until 1880, when it became consolidated with the plaintiff in error, an Illinois corporation, and sold

and transferred to this company all its property and franchises, including its interest so as aforesaid acquired of the Omaha & Southwestern Railroad Company.

The act under which the last named company was incorporated contained this provision:

"Sec. 82. If it shall be necessary in the location of any part of any railroad to occupy any road, street, alley or public way or ground of any kind or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authority owning or having charge thereof, and the railroad company to agree upon the *manner* and upon the *terms and conditions* upon which the same may be used or occupied.

And also this further provision:

"Sec. 103. Every railroad corporation shall maintain and keep in good repair all bridges and their abutments which such corporation shall construct, for the purpose of enabling their road to pass over or under any turnpike road, canal, watercourse or other way."

At the time of the organization of the company last named, there was no provision either in the constitution or in the laws of the state reserving to the latter the right to alter or amend the charter.

From 1881 to 1887 Omaha was a city of the first class; its corporate existence being assured and its powers and duties defined by Chapter 17, laws of Nebraska, 1881, providing for the incorporation of such cities and the laws amendatory thereof and such other public acts applicable to such cities as the legislature may from time to time pass. It had by these provisions the care and control of its streets and could open,

vacate or alter them at pleasure, subject to such regulations and restrictions as the law provided.

It could also make all contracts and pass such acts in relation to the property and concerns of the city as were necessary to the proper exercise of its powers.

The mayor and city council were authorized to exercise their power and to pass any and all ordinances not repugnant to the constitution and laws of the state.

In 1884, the plaintiff in error, in the name of the Omaha & Southwestern Railroad Company, secured from the city of Omaha the right to locate and operate its tracks across certain streets and alleys in said city and particularly across Eleventh street. This right was granted by ordinance number 729. (Rec. 70.) Section 2 of this ordinance reads:

> "Said Omaha & Southwestern Railroad Company shall have the right to construct, maintain and operate a line of railroad along, upon, through and across said portion of said streets and alleys as a part of its line; Provided, *that said railroad track and tracks are constructed so as to conform to the grade of said streets as near as may be, and so as to interfere as little as possible with the travel along and upon said streets;* and, Provided, that nothing herein contained shall be construed as interfering with the right of any property owner to recover from said company any damages resulting to private property by reason of the construction of said railroad, and nothing herein granted shall authorize any interference with the tracks of the Union Pacific Railway Company, now laid and operated by said Union Pacific Railway Company in any portion of the streets and alleys herein named and enumerated."

In compliance with this provision, the plaintiff in

error immediately constructed its line of railroad from Tenth street in said city southwesterly to the limits thereof and located the same across Eleventh street aforesaid.

Long prior to the date last mentioned, the Union Pacific Railway Company, having acquired a right to do so, had located and was operating a large number, to-wit: twenty-one railway tracks, across said Eleventh street, which practically occupied it between the south line of Marcy street and the north line of Leavenworth street. These tracks were in constant use, both for general traffic and switching purposes, so that the location and operation of an additional track by the respondent alongside thereof, did not materially increase the inconvenience or danger to the public in the use of said street.

In 1885, the legislature of the state passed an act entitled: "An act to provide for viaducts, bridges and tunnels in certain cases, in cities of the first class," which took effect March 4th of that year. See Chap. 12, laws of Nebraska, 1885. From this act is quoted:

"Section 1. That the mayor and city council in any city of the first class shall have power, whenever they deem any improvement, herein provided for, necessary for the safety and convenience of the public, to engage and aid in the construction of any viaduct, or bridge over, or tunnel under any railroad track or tracks, switch or switches in such cities, when such track or switches cross or occupy any street, alley or highway thereof, in the manner and to the extent hereinafter provided.

Sec. 2. Whenever any such viaduct, bridge or tunnel shall be deemed necessary, as provided in the preceding section, the mayor and city council shall have the power to secure

and adopt plans and specifications therefor, together with the estimated cost of the work, and thereupon, if the railroad company or companies, across whose tracks or switches the work is proposed to be built, will assume three-fifths (3-5) of all damages to abutting property on account of construction of said viaduct, bridge or tunnel, and secure to the city the payment of the necessary funds to meet it as the work progresses, in such manner and with such security as the mayor and city council shall require, and when the payment of the further sum of one-fifth (1-5) of the money required for said improvement is arranged for in manner satisfactory to said mayor and council, either by private donations or by execution of good and sufficient bond as will protect said city from the payment of said one-fifth (1 5), then the said mayor and council may proceed to contract with the necessary party or parties for the construction of such viaduct, bridge or tunnel, under the supervision of the board of public works of such city, and to provide for the payment of one-fifth (1-5) of the cost thereof by the city, by special tax on all taxable property in such city, and one fifth (1-5) by special tax to property benefitted, as provided in the following section, if not otherwise provided for.

Sec. 3. * * * * * * *

Sec. 4. The city, with the assent of the railroad company or companies aiding in the construction of any such viaduct, bridge or tunnel as herein provided, may permit any street railway company to build its street railway track and operate its railway upon or through the same, upon such terms and conditions and for such compensation as shall be agreed upon between the city and the street railway company. And the compensation for such use shall be set apart and used towards the maintenance of such viaduct, bridge or tunnel.

Sec. 5. * * * * * * *

Sec. 6. The mayor and council of any such city shall have the

power to pass any and all ordinances, not in conflict with this act, that may be necessary or proper for the construction, *maintenance and protection* of the works herein provided for.

Sec. 7. * * * * * * * *

In 1886, by virtue of the provisions of this act and in compliance therewith, the city of Omaha and the Union Pacific Railway Company and the plaintiff in error entered into an agreement in writing, covering certain matters and things, among them the construction of a viaduct on Eleventh street across the tracks then owned and operated by these railway companies. This agreement is fully set out in the record (page 22) and it will be necessary to quote the provision only relating to the viaduct in question.

"* * * Witnesseth: That the said parties of the second part, in pursuance of the provisions of an act of the legislature of the state of Nebraska, entitled, 'An act to provide for viaducts, bridges and tunnels in certain cases in cities of the first class,' do hereby assume and agree to pay, as may be required by the mayor and city council of said city, three-fifths of the entire cost of constructing a viaduct along Eleventh street in said city over the railroad tracks of the said parties of the second party, and three-fifths of the damages to abutting property on account of the construction of such viaduct, not otherwise provided for by waivers or private contributions, such entire cost and damages not to exceed the sum of ninety thousand dollars ($90,000), the amount so assumed and agreed to be paid being three-fifths of the entire cost and damages, to be proportioned between said parties of the second part as follows: Three-fourths thereof to be paid by said Union Pacific Railway Company and one-fourth thereof to be

paid by said Omaha & Southwestern Railroad Company.
* * *

The plans and specifications for said viaducts, before contracts for the construction thereof are entered into, shall be submitted to and approved by said parties of the second part, and should plans and specifications be adopted by said party of the first part, and approved by said party of the second part, which shall increase the said cost and damages beyond the amounts herein limited, then the said parties of the second part are to pay their respective proportions of such increased cost and damages, in the same manner and according to the same division as hereinbefore agreed. * * *"

Under this contract, the viaduct was built and formally opened to the use of the public early in 1887. Its superstructure is iron supported by stone abutments, the portion over the main tracks being supported by heavy stone piers. The four beams are of heavy wood upon which is laid a wooden pavement. The complete structure is in every respect first class and designed to be of the strength and endurance possible to viaducts of its class.

It was contemplated at the time it was constructed that the wooden floor would necessarily wear out at different places at periods from three to ten years; so that in the ten years the entire floor would be renewed, parts at such times as might be necessary. Owing, however, to the extraordinary use of the viaduct by the travel natural to Tenth street as well as Eleventh street, and by the street railway company, the natural life of the flooring was reduced from ten to about five years.

In January, 1891, when the viaduct on Tenth

street was opened for public use, the travel over the Eleventh street viaduct was diverted to the Tenth street viaduct. In the meanwhile, however, the extraordinary use already made of the Eleventh street viaduct with the neglect of the city to make the necessary repairs, brought it to its present unsafe condition, so that its continued use, even for the travel natural to Eleventh street, was inconvenient and dangerous. A subsequent examination by competent engineers and by the committee of the city council referred to in the pleadings and testimony, disclosed the fact that it would require about $13,000 to renew the flooring and restore the viaduct to the condition in which it would have been, had the repairs been made from time to time when necessary and as contemplated by the parties when they executed the contract for its construction. (Rec. pp. 8, 9, 10 and 11.)

While the events above recited were transpiring, the defendant in error, through legislative aid, was being developed into a metropolitan city with its present powers and duties. The evolution began in 1887 by the adoption of an act, entitled: "An act incorporating metropolitan cities, and defining, regulating, and prescribing their duties, powers and government." Laws of Nebraska, 1887, p. 105, approved March 30, 1887. Section 48 of this act prescribed under what circumstances and in what manner railroad companies *owning or operating* any railroad track or tracks upon or across any public street or streets of such cities might be compelled to construct and maintain viaducts thereon. It reads as follows.

"Sec. 48. The mayor and council shall have power to require any railroad company or companies, owning or operating any railroad track or tracks upon or across any public street or streets of the city, to erect, construct, re-construct, complete, and keep in repair any viaduct or viaducts, upon or along such street or streets, and over or under such track or tracks, including the approaches to such viaduct or viaducts as may be deemed and declared by the mayor and council necessary for the safety and protection of the public. *Provided*, That the approaches to any such viaduct, which any railroad company or companies may be required to construct, re-construct, and keep in repair, shall not exceed, for each viaduct, a total distance of eight hundred feet. Whenever any such viaduct shall be deemed and declared by ordinance necessary for the safety and protection of the public, the mayor and council shall provide for appraising, assessing, and determining the damages, if any, which may be caused to any property by reason of the construction of such viaduct and its approaches.

The proceedings for such purpose shall be the same as provided herein for the purpose of determining damages to property owners by reason of the change of grade of a street, and such damages shall be paid by the city, and may be assessed by the city council, against property benefited, and the cost of approaches beyond said distance of eight hundred feet may also be assessed by the council against property benefited by reason of the construction of any such viaduct and its approaches.

The width, height and strength of any such viaduct, and the approaches thereto, the material therefor, and the manner of the construction thereof, shall be as required by the board of public works, as may be approved by the mayor and council.

When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct, the pro-

portion thereof, and of the approaches thereto, to be constructed by each, or the cost to be borne by each, shall be determined by the mayor and council.

After completion of any such viaduct, any revenue derived therefrom by the crossing thereon of street railway lines, or otherwise, shall constitute a special fund, and shall be applied in making repairs to such viaduct.

All ordinary repairs to any such viaduct, or to the approaches thereto, *shall be paid out of such fund, or shall be borne by the city.*"

Subsequently, in 1893, the legislature amended this act to read as it now stands. Laws of Nebraska, 1893, p. 70, chap. 3, sec. 7. It will only be necessary therefore to quote the words omitted from and added to the original section. The words omitted are:

"Provided that the approaches to any such viaduct which any railroad company or companies may be required to construct, re-construct and keep in repair, shall not exceed for each viaduct a total distance of 800 feet."

Also:

"And the cost of approaches beyond said distance of 800 feet may also be assessed by the council against property benefited by reason of the construction of any such viaduct and its approaches."

Also:

"After the completion of any such viaduct, any revenue derived therefrom by the crossing thereon of street railway lines or otherwise, shall constitute a special fund and shall be applied in making repairs to such viaduct."

Also:

"All ordinary repairs to any such viaduct or to the approaches

thereto shall be paid out of such fund or shall be borne by the city."

The words added are:

"It shall be the duty of any railroad company or companies upon being required as herein provided, to erect, construct, re-construct or repair any viaduct, to proceed within the time and in the manner required by the mayor and council, to erect, construct, re-construct or repair the same, and it shall be a misdemeanor for any railroad company or companies to fail, neglect or refuse to perform such duty, and upon conviction any such company or companies shall be fined one hundred dollars ($100) and each day any such company or companies shall fail, neglect or refuse to perform such duty shall be deemed and held to be a separate and distinct offense, and in addition to the penalty herein provided any such company or companies shall be compelled by mandamus or other appropriate proceeding to erect, construct, re-construct or repair any viaduct as may be required by ordinance as herein provided. The mayor and council shall also have power whenever any railroad company or companies shall fail, neglect or refuse to erect, construct, re-construct or repair any viaduct or viaducts after having been required so to do as herein provided, to proceed with the erection, construction, re-construction or repair of such viaduct or viaducts by contract or in such other manner as may be provided by ordinance, and assess the cost of the erection, construction, re-construction or repair of such viaduct or viaducts against the property of the railroad company or companies required to erect, construct, re-construct or repair the same, and such cost shall be a valid and subsisting lien against such property, and shall also be a legal indebtedness of said company or companies in favor of such city, and may be enforced and collected by suit in the proper court."

In May, 1890, the Union Pacific Railway Com-

pany entered into an agreement in writing with the Chicago, Rock Island & Pacific Railway Company, by which it gave to that company for the term of nine hundred and ninety-nine years the full, equal and joint possession and use of its main and passing tracks then or thereafter to be located and established between the terminus of such tracks in the city of Council Bluffs, Iowa, and a line drawn at a right angle across said tracks within one and one-half miles southwesterly from the passenger station at South Omaha, Nebraska, including the bridge on which said tracks extend across the Missouri river between the cities of Council Bluffs and Omaha; also, connections with the Union depot tracks in Omaha, the side and spur tracks leading from the main tracks to the lower grade of the Pacific company's sidings and spur tracks in Omaha and such extensions as might be thereafter made. These tracks, located and established upon the main right of way of the Pacific company and also the spur or side track leading therefrom to the lower grade as aforesaid, are included among the twenty-one tracks already noticed and cross Eleventh street under the viaduct in question.

On the same day a similar contract was made between the Pacific Company and the Chicago, Milwau- & St. Paul Company. Subsequently, in the same year, each of these companies by virtue of its contract, entered into the possession and enjoyment of the rights and interests thereby secured and have continued in the same until the present time. The Rock Island Company has been occupying and using its tracks not only for its local traffic in Omaha and

South Omaha, but also as a part of its through line between Chicago, Illinois, and Denver, Colorado, and has been operating thereon numerous daily freight and passenger trains and also numerous special or extra trains. The Milwaukee company has been occupying and using its tracks not only for its local traffic in Omaha but also as a part of its through line between Chicago and South Omaha aforesaid. Each of said companies operate as many trains daily and run as many locomotives and cars across said street as does this respondent.

Nearly a year after the viaduct had come to its present condition and after considerable controversy between the city and the railroad companies as to which was bound to make the repairs in question, the mayor and city council began the proceedings described in the record by resolution adopted July 21, 1892, (Rec. 8) providing that the committee on viaducts and railways and the city engineer should examine the road-bed of the viaduct and report whether or not it was necessary to repave it. Acting under this resolution, the committee made the examination and on the 23rd of August following, reported in writing the condition of the viaduct. This report appears as exhibit "B" to the city's petition. (Rec. 9.)

Subsequently, on the 4th day of December, 1893, the city council passed ordinance No. 3734, declaring the necessity for the repair of the viaduct by placing thereon a new and substantial floor. This ordinance also contained a provision directing and ordering the board of public works to prepare plans and specifica-

tions for such repairs and to submit same to the mayor and city council for their consideration and approval and also directing the city engineer to render such service to the board as it might require in preparing the necessary plans, drawings, details and specifications which were prepared and submitted to the mayor and city council as directed and approved by them. Copies of the ordinance and of the plans and specifications appear as exhibits "D" and "E" of the defendant in error's petition. (Rec. 9 and 10.)

Subsequently, on January 30, 1894, the city council passed ordinance No. 3752, a copy of which appears as exhibit "F" of the defendant in error's petition. (Rec. 10). Sections 2 and 3 of this ordinance read as follows:

"Sec. 2. That the Union Pacific Railway Company be and is hereby ordered, directed and required to repair that portion of said Eleventh street viaduct from the north end of said viaduct south for a distance of two-thirds of the entire length of said viaduct and the Chicago, Burlington & Quincy Railroad Company, grantee and successor to the Burlington & Missouri River Railroad Company in Nebraska and the Omaha & Southwestern Railroad Company, be and is hereby ordered, directed and required to repair that portion of said Eleventh street viaduct commencing at the south end thereof, and extending northward a distance of one-third of the entire length of said viaduct; the said repairs to be made in accordance with said plans and specifications and to be done under the supervision of the City Engineer; the said repairs to be commenced without unnecessary delay and fully completed as herein required within ninety days from the passage and approval of this ordinance."

"Sec. 3. That the city clerk be and is hereby directed to furn-

ish to said Union Pacific Railway Company and to said Chicago, Burlington & Quincy Railroad Company owning or operating railroad tracks upon and across said Eleventh street under said Eleventh street viaduct, a duly certified copy of this ordinance without unnecessary delay, and that the city engineer is hereby directed to furnish to each of said railroad companies a copy of said plans and specifications, and to superintend the work of making said repairs."

The required notice having been served upon the plaintiff in error and it having declined to make the repairs, the defendant in error, on the 19th day of January, 1895, filed with the clerk of the district court of Douglas county, Nebraska, a petition praying for a writ of mandamus, and procured its issuance and service upon the plaintiff in error, commanding it to appear before the court on the 4th day of February following, to show cause why it should refuse to make the repairs.

This petition in brief states (rec. 5) that at and before the bringing of this suit the city of Omaha was a city of the metropolitan class, existing under and governed by the provisions of chapter 12 *a*—Cities of the metropolitan class,—Comp. Stats. of Nebraska 1893.

That the plaintiff in error, the Chicago, Burlington & Quincy Railroad Company, was a corporation, created and existing by virtue of the laws of the state of Illinois, and authorized by the laws of the state of Nebraska to transact business as a railroad company in said state and was the grantee and successor of the Burlington & Missouri River Railroad Company in Ne-

braska and of the Omaha & Southwertern Railroad Company; both corporations, organized and existing under the laws of the state of Nebraska. That the plaintiff in error was the owner of and engaged in operating certain railroad tracks across Eleventh street in said city, upon which and across said tracks was located an iron viaduct with plank flooring extending between Jackson and Mason streets, a distance of four blocks, in said city. That this viaduct was built by the plaintiff in error and the Union Pacific Railroad Company and completed about the year 1886 or 1887.

That in 1892, the viaduct had become dangerous for public travel and by reason thereof, the city council, on the 21st of July of said year, passed a concurrent resolution which was approved by the mayor of the city, requiring its committee on viaducts and railways, and the city engineer, to examine and report its condition and the necessity for its repair. That on the 23rd of August following, this committee reported it to be in a dangerous condition and in need of immediate repair, and on the 2nd of September following, the city engineer made a similar report.

That thereafter, the viaduct was closed for public travel and remained so for about two years. That on the 4th of December, 1893, ordinance No. 3734 was duly passed by the city council of said city and duly approved December 12, 1893, by the mayor thereof, declaring the necessity of repairing the viaduct and directing the board of public works to prepare plans and specifications therefor.

That afterwards, pursuant to the provisions of

the ordinance, the plans and specifications were prepared and duly submitted to the mayor and city council and approved by them by ordinance No. 3752, passed January 30, 1894, and approved by the mayor February 2, following.

That thereafter, in February, 1894, pursuant to the provisions of said ordinance the city clerk furnished the plaintiff in error and the Union Pacific Railway Company copies of the plans and specifications and also duly certified copies of the ordinances and proceedings of the city council aforesaid.

That the plaintiff in error refused to comply with the request of the city and to make the repairs aforesaid, or to take any action whatever with reference thereto.

In compliance with the order of the court, the plaintiff in error appeared and filed its answer, (rec. 13) substantially admitting the averments of the petition and furthermore set forth, among other things, that at the time the viaduct in question was constructed, the city of Omaha was a city of the first class existing under and by virtue of the laws of the state of Nebraska providing therefor; that by virtue of an act of the legislature entitled "An act to provide for viaducts, bridges and tunnels in certain cases, in cities of the first class," laws of Nebraska, 1885, p. 109, approved March 4, 1885, it was vested with the power and authority, under certain circumstances, to engage in the construction and maintenance of viaducts and bridges over railroad tracks occupying the streets and alleys within its corporate limits, and

was also authorized by said act, to enter into written agreements or contracts with any railway company or companies occupying any streets or alleys aforesaid, for the purpose of securing the contributions therein provided for, the construction of such viaducts, and the payment of damages arising therefrom. Also, that at and for many years prior to the time when the proceedings to construct the viaduct were instituted, the city of Omaha had been divided by the grades and tracks of certain railway companies so that the use of the several streets in said city, crossing said grades and tracks, was inconvenient and at certain places, viz. on Tenth street, exceedingly dangerous. That during these years, intercourse between the portion of the city south and the portion of the city north of such grades and tracks, was largely maintained by means of Seventh, Tenth, Thirteenth and Seventeenth streets of said city. That for the purpose of providing greater facilities between these parts of the city, the city authorities, pursuant to and in accordance with the provisions of the act last referred to, entered into a written contract with the Union Pacific Railway Company and the Chicago Burlington and Quincy Railroad Company under the name and style of the Omaha and Southwestern Railroad Company, whereby it was agreed between them, that the said railway companies, each for itself, would, at its own expense, open Seventh, Thirteenth and Twentieth streets in said city through their respective rights of way of certain width and also build retaining walls and make certain other suitable provisions for the convenient and safe use of such streets and would also each con-

tribute certain proportions of three-fifths of the entire cost of, and of damages involved in, the construction of certain viaducts upon Eleventh and Sixteenth streets; such cost and damages for the Eleventh street viaduct not to exceed the sum of $90,000 and for the Sixteenth street viaduct not to exceed the sum of $30,000 and the said railway companies would also open Fourteenth street through their respective rights of way at such time and of such character as future public necessity might require, and in consideration of which, the city of Omaha agreed upon its part to construct and maintain the viaducts and to pay two-fifths of the entire cost and damages thereby incurred and to close Sixth, Twelfth and Fifteenth streets in said city and to allow Fourteenth, Eighteenth and Nineteenth streets to remain unchanged. (Rec. 22.)

That the terms of this contract were faithfully performed by the railroad companies; that the city constructed the viaducts and opened the same for public use, as provided in said contract, and in accordance with the provisions of the act of 1885; that at all times since its construction, the viaduct has been the property of the city of Omaha and not the property of the railway companies and that under the laws of the state of Nebraska and under the provisions of its former and present charter and under the contract aforesaid, it was and is the duty of the city to maintain the viaducts in good condition for public use. That since the construction of the viaduct on Eleventh street, to-wit: January 1, 1891, the viaduct

along Tenth street and over the tracks aforesaid was constructed, completed and opened for public use and travel; that on account of its being much more convenient and safe for public use than the one on Eleventh street, it is and will continue to be occupied and used by street railway companies and the general public which formerly occupied and used the Eleventh street viaduct and that should the railway companies or any of them, be compelled to repair the Eleventh street viaduct, in accordance with the demands of the city, it would be very little used by wagons or vehicles or by street railway companies. Also, that the viaduct aforesaid covered a space on Eleventh street of about 1,250 feet, of which about 400 feet are occupied by the several tracks owned or operated by the railroad company; that the remainder of the space was, before the construction of the viaduct, occupied and used for street purposes and was, under the law, controlled and cared for by the city; that the distance from the north line of the space occupied by the tracks aforesaid to the north line of the viaduct, is about 700 feet, and it was submitted that it was not competent for the legislature to put upon the railway companies the burden of maintaining that portion of the viaduct over such unoccupied space of street as the city would, but for such viaduct, be required, under the law, to maintain and repair; that whatever the rule of law might be as to the construction of the viaduct, in any event the city should be required to contribute such proportion of the entire cost of its maintenance as that part of the street under the viaduct bears to the entire part of the street occupied by it

and that any law authorizing the city to impose the cost of the entire maintenance upon the railway companies would be an arbitrary and unwarranted exercise of legislative power and in violation of the constitutions of the state and of the United States. * * *

It was further shown by the answer that since 1886, the Chicago, Rock Island & Pacific Railway Company, a corporation organized and existing by virtue of the laws of the state of Illinois, had established a through line of railway, extending from Chicago, Illinois, to Denver, Colorado, upon which it was operating its freight and passenger trains. That said line was located through the city of Omaha and comprised double tracks located across Eleventh street aforesaid, the same being a part of the twenty-one tracks across said street and under said viaduct built by the Union Pacific Railway Company. Also, that the Chicago, Milwaukee & St. Paul Railway Company, a corporation existing by virtue of the laws of Wisconsin, had, since 1886, established a through line of railway between Chicago, Illinois, and South Omaha, Nebraska, upon which it was operating its frieght and passenger trains. That said line was located through the city of Omaha and comprised double tracks extending across Eleventh street aforesaid, the same being a part of the twenty-one tracks across said street and under said viaduct.

That these companies each by separate contract with the Union Pacific Railway Company, had acquired a joint interest and ownership in the said tracks

used by it. That whatever danger might arise to the public in the use of said tracks or whatever necessity there might be for the construction and maintainance of a viaduct thereon, the danger and necessity alike originated as much in the use and operation of the tracks by the two companies last named as from the use by plaintiff in error of its single track across said street.

It was also submitted by the answer that it was not competent for the legislature to impose upon the plaintiff in error the duty of maintaining or repairing the Eleventh street viaduct for the reason that to do so would be in *violation of the obligation of the viaduct contract and contrary to the provisions of the constitution of the United States.*

It was also submitted that the allegation contained in the petition, wherein is described the several proceedings in the city council and board of public works as well as the several acts alleged to have been performed by its representatives and officials relating to the repair of the viaduct were wholly unauthorized and unwarranted and of no effect as far as the plaintiff in error was concerned and that the omission of any and all reference to the several railway companies owning and operating tracks across Eleventh street under the viaduct, rendered the proceedings upon the part of the city unwarranted, arbitrary, unjust and illegal and the plaintiff in error denied that it was bound to maintain or keep in repair the viaduct or to contribute thereto.

It was further set forth that the Union Pacific

Railway Company had refused and was still refusing to recognize the right of the city of Omaha to require it to contribute towards the repair or maintenance of the said viaduct and had refused and was still refusing to comply with the ordinances and requirements of the said city in that behalf.

It was further alleged that according to the plans and specifications referred to, the estimated cost of the repair of the Eleventh street viaduct, would be about $13,400 and that the city was asking that the plaintiff in error be compelled to repair the north one-third of the viaduct without regard as to whether the cost of repairing such proportion would be one-third of the cost of repairing the entire viaduct, and it was submitted that the question of apportioning the cost of the said repairs between the several railway companies named, is *one for the courts* and that there were no facts stated in the petition upon which it could be judicially determined what would be a fair and equitable distribution thereof among the several companies operating the tracks aforesaid; and further, that the attempt upon the part of the city council and board of public works, described in the petition, to apportion the cost of repairing and maintaining the north one-third of the viaduct to the plaintiff in error herein, was an arbitrary, unwarrantable, inequitable and discriminating act against it and that the *city was without jurisdiction or support* either in law or equity.

Upon the trial, testimony was received merely for the purpose of making more definite some of the matters pleaded. There was practically no contro-

versy respecting the circumstances of the case. The contest involved only the construction of legislative enactments and the validity of municipal proceedings.

In the argument of the case, the railroad company insisted:

1. That by the terms of section 48 of the metropolitan charter, the city was required to impose the burden of maintaining the viaduct upon all the railroad companies operating the tracks under it and therefore in attempting to lay it upon two of the four companies named, it had cheated itself of jurisdiction and thereby rendered its proceedings unauthorized and void.

2. That if by section 48, the city was authorized to impose the burden aforesaid upon two of the four companies named, then the section itself was void as an attempt upon the part of the state to arbitrarily compel the surrender of private property for public uses without compensation and for the benefit of other citizens.

3. That section 48 was vicious because it contained no provision whatever requiring notice to railroad companies of the proceedings therein provided for or affording them an opportunity to be heard.

4. That these proceedings were in fact without notice to the railway companies affected by them, and without affording them an opportunity to be heard.

5. That these proceedings, if consummated, would impair (a) the obligations of the contract under which the track of the plaintiff in error across Elev-

enth street was located, and (b) the obligations of the contract under which the viaduct thereon was built.

The trial court, however, rejected these contentions and rendered judgment for the city, whereupon the railroad company filed a motion for a new trial (rec. 34) which was promptly overruled and a peremptory writ of mandamus ordered to be issued in accordance with the prayer of the petition. (Rec. 36.) Thereupon the railroad company carried the controversy to the state supreme court where it was re-examined and the judgment of the trial court affirmed.

In its petition in error to that court, (rec. 1), the railroad company alleged that the trial court erred in rendering its judgment for many reasons and among these the following:

That the judgment was contrary to law.

That the city had no power or authority to require or compel the railroad company to repair the viaduct.

Also in holding that the provisions of section 48 did not impair the obligations of the contract under which the viaduct was built and also the obligations of the contract created by the laws of the state under which the railroad company was incorporated and the city ordinance 729 under which its track across Eleventh street was located.

Also in not holding section 48 unconstitutional.

Also in refusing to adjudicate the issues made by the pleadings in the case.

Also in holding that the charter of the railroad

company and ordinance 729 did not constitute a contract within the protection of the constitution of Nebraska and of the United States, guaranteeing its inviolability.

Also in arbitrarily compelling the railroad company to repair one-third of the viaduct inasmuch as it owned and operated a single track of the twenty-one or more tracks across Eleventh street under the viaduct, such requirement being arbitrary, unjust, inequitable and unconstitutional.

Also in holding that the Union Pacific Railway Company, the Chicago, Rock Island & Pacific Railway Company, the Chicago, Milwaukee and St. Paul Railway Company were not necessary parties with the plaintiff in error to the proceedings to determine the proportion which each should bear of the cost of repairing the viaduct.

Also in not deciding that the apportionment of one-third of the cost of repairing the viaduct to the plaintiff in error, was the inequitable, unjust and arbitrary, and in not holding that the action of the city council in making such apportionment was subject to review in the proceeding in the trial court.

Upon the hearing in the state supreme court, no question was raised as to the right of the plaintiff in error to be heard upon all the questions relating to the power and authority of the city to compel it to repair the viaduct.

In its brief and argument, the railroad company, as in the court below, insisted that section 48 and the proceedings by the city council, in pursuance thereof,

if consummated, would deprive it of its property and rights secured by the federal constitution, and that court in rendering its opinion, stated the questions considered and decided in these words: (Rec. 84.)

"To summarize briefly, we conclude, from the foregoing authorities and many others examined, that the legislation assailed in this case is a valid exercise of the police power of the State over the subject to which it applies; that it does not authorize the appropriation of the respondent's property without due process of law in a constitutional sense, since the latter is enabled to invoke the equal protection of the law by any appropriate proceeding, and because it did in fact, put in issue by the answer both the validity of the ordinance and the reasonableness of the amount apportioned to it for the repair of the viaduct in question. Nor is such legislation violative of any contract obligation, since the power to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety cannot be bartered away by contract or otherwise. Such power is inherent in the sovereignty of the state, and may be asserted directly by the legislature, or may, in the absence of constitutional restriction upon the subject, be delegated to the several municipal corporations or other agencies provided for its exercise. The single purpose of the legislation, whether contemplating the erection or re-construction of the viaduct, is to reduce to a minimum the danger to life and limb for which the railroad companies are chiefly responsible, and it is not unreasonable to require the parties to maintain the street in a condition of safety, for whose benefit and convenience it was originally rendered unsafe."

Upon this record, the plaintiff in error has

brought the controversy to this court for review upon the following assignment of errors: (Rec. 91.)

"1. The supreme court of Nebraska erred in making the decree or judgment rendered in this suit and in affirming the erroneous judgment therein of the district court of Douglas County, Nebraska.

2. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of section 48 of chapter 10, Laws of Nebraska, 1887, as amended in 1893, and constituting section 7 of chapter 3, Laws of Nebraska, 1893, it impairs the obligation of the contract under which the track of the plaintiff in error across Eleventh street, in the city of Omaha, Nebraska, under the viaduct thereon, was located and constructed, contrary to the constitution of the United States.

3. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of ordinance No. 3752, passed by the city council of the city of Omaha on January 30, 1894, an authority exercised under the state of Nebraska, it impairs the obligation of the contract under which the track of the plaintiff in error across Eleventh street, in the city of Omaha, Nebraska, under the viaduct thereon, was located and constructed, contrary to the constitution of the United States.

4. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of section 48 of chapter 10, Laws of Nebraska, 1887, as amended in 1893, and constituting section 7 of chapter 3, Laws of Nebraska, 1893, it impairs the obligation of the contract under which the viaduct on Eleventh street, in said city of Omaha, described in the record herein, was built, contrary to the constitution of the United States.

5. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of ordinance No. 3752, passed by the city council of the city of Omaha on Janu-

ary 30, 1894, an authority exercised under the state of Nebraska, it impairs the obligation of the contract under which the viaduct on Eleventh street, in said city of Omaha, described in the record herein, was built, contrary to the provisions of the constitution of the United States.

6. The decree or judgment is erroneous in that it deprives the Chicago, Burlington & Quincy Railroad Company of its property and confers it upon other persons for a private use, contrary to the constitution of the United States.

7. The decree or judgment is erroneous in that it deprives the Chicago, Burlington & Quincy Railroad Company of its property without making just compensation therefor, contrary to the constitution of the United States and in abridgement of the privileges and immunities of the Chicago, Burlington & Quincy Railroad Company, thus denying to it the equal protection of the law.

8. The decree or judgment is erroneous in that it deprives the Chicago, Burlington & Quincy Railroad Company of its property without due process of law, contrary to the constitution of the United States."

The defendant in error has filed its united motions herein to dismiss the writ for want of jurisdiction and to affirm the judgment of the state court and in support thereof insists:

1. That this court is without jurisdiction for the reason that the record does not show a case within the purview of section 709 of the revised statutes.

2. That, conceding the case to be within the jurisdiction of this court, the judgment of the state court should be affirmed on motion, for the reason that the question on which the jurisdiction depends is so frivolous as not to need further argument; that paragraph 5 of rule 6 of this court should be applied to it.

The contention that this court is without jurisdiction is based upon the assumption that in the present case, no federal question has been, either in express terms or by *necessary effect*, decided by the state courts and that it does not appear from the record of either the pleadings, the evidence, the findings of fact or the opinions and judgments of the courts that the plaintiff in error claimed any of the rights guaranteed to it by the federal constitution.

In view of the recitals of the record, it seems unnecessary to do more than to suggest that both in the trial and the supreme courts of the state it was strenuously urged that to compel the railroad company to furnish the repairs in controversy would operate:

a. To impair the obligations of the contracts mentioned in the pleadings and evidence;

b. To deprive the company of its property without due process of law, and to deny it the equal protection of the laws.

Since, therefore, these invasions were in terms authorized by the provisions of section 48 of the charter of the defendant in error, the appeal to the courts was for the sole purpose of enforcing a law passed in violation of the provisions of the federal constitution and every question raised during the progress of the controversy was considered and adjudged with reference to the validity of this section.

Numerous cases involving the rights of litigants under the federal constitution and presented *in form and mode the same as in the case at bar* have been brought here for review from the judgments of the

highest state courts. The decisions in these cases clearly establish the jurisdiction of this court over the judgments of the highest courts of the state wherever rights acknowledged and protected by the federal constitution are invaded or denied under the shield of state legislation, and the form and mode in which the federal questions are raised are of minor importance, if in fact they were raised and decided.

Wilson v. Black-bird Creek Marsh Co., 1 Peters, 245;

Satterlee v. Matthewson, 2 Peters, 410;

Bridge Proprietors v. Hoboken L. & I. Co., 68 U. S., 116;

Murray v. Charleston, 96 U. S., 432;

Furman v. Nickel, 75 U. S., 44.

In *Wilson v. Black-Bird Creek Marsh Co.*, the company had instituted an action of trespass against Wilson in the supreme court of Delaware for damages to its dam across a creek constructed under an act of the general assembly of Delaware. To the plea of Wilson denying the capacity of the act to authorize a dam across a navigable stream, the company interposed demurrers which were sustained and judgment rendered for the company. The case having been carried to the state court of appeals and there affirmed, it was prosecuted by writ of error to the supreme court of the United States and upon the hearing, the jurisdiction of this court was questioned, for the reason that the record failed to disclose that the constitutionality of the act of the legislature was

drawn in question. In delivering the opinion of the court, Mr. Chief Justice Marshall said:

> "Undoubtedly, the plea might have stated in terms that the act, so far as it authorized a dam across the creek, was repugnant to the constitution of the United States and it might have been safer, it might have avoided any question respecting jurisdiction so to frame it—but we think it impossible to doubt that the constitutionality of the act was the question, and the only question, which could have been discussed in the state court. * * * It is not necessary to state in terms on the record that the constitution or law of the United States was drawn in question. * * * It is sufficient that the constitutionality of a state law was questioned and the decision has been in favor of the party claiming under such law."

In *Bridge Proprietors v. Hoboken L. & I. Co.*, the proprietors in their bill in the lower court alleged an exclusive right to construct and operate bridges within certain limits proscribed by an act of the legislature of New Jersey. They also charged that by a subsequent act of the legislature, that state had authorized the company to erect and maintain a bridge within the limits aforesaid and averred that such proceeding would violate the contract between them and the state under which they had erected their bridge. The bill having been dismissed, the suit was brought to this court where objection was made to its jurisdiction because in the pleadings it was not stated in terms, that the statute was void for the reason it was in conflict with the constitution of the United States.

Mr. Justice Miller, in delivering the opinion of the court, said:

> "It would be a new rule of pleading and one altogether superfluous to require a party to set out specially the provision of the constitution of the United States on which he relies for the action of the court in the protection of his rights. If the courts of this country and especially this court can be supposed to take judicial notice of anything without pleading it specially, it is the constitution of the United States, and if the plaintiff and defendant in their pleadings make a case which necessarily comes within some of the provisions of that instrument, this court usually can recognize the fact without requiring the pleader to say in words, 'this paragraph of the constitution is the one involved in this case.' "

Mr. Justice MILLER also quotes from the opinion of Mr. Justice Story in the case of *Crowell v. Randall*, 10 Peters, 368, the rules therein stated, as necessary to bring a case within the 25th section of the judiciary act. The third of these rules is: "That it is not necessary that the question should appear on the record to have been raised and the decision made in direct and positive terms *ipsissimus verbis*, but that it is sufficient, if it appears by clear and necessary intendment, that the question must have been raised and must have been decided in order to have induced the judgment."

And further, speaking of the effect of dismissing the bill on the pleadings, Mr. Justice Miller said: "It could not have done this, without holding the act of 1860 to be valid, as it was the only authority on which defendants rested their right to build any structure over the Hackensack river."

In *Murray v. Charleston*, the plaintiff was the owner of certain stock certificates issued by the city, whereby it promised to pay to the owners thereof the sums of money therein mentioned together with 6 per cent. interest, payable quarterly. The city having retained a portion of the accrued interest on these certificates, suit was commenced in the state court to recover it. The answer to the complaint admitted the retention charged, but attempted to justify it under certain city ordinances which were therein set out in full. By these ordinances, the city appraiser was directed to assess a tax of two cents upon the dollar of all real and personal property in the city of Charleston for the purpose of meeting the expenses of the city government. The third section of each ordinance declared that the taxes assessed on city stock should be retained by the city treasurer out of the interest thereon when the same became due and payable. On these pleadings, the case was submitted to the court for trial without a jury and the court made a special finding of facts, substantially as set forth in the complaint and averred in the answer, upon which judgment was given for the city. This judgment being affirmed in the supreme court, the case was, by writ of error, brought to the federal supreme court. It was objected upon the hearing that this court had no jurisdiction of the case because no federal question was raised of record or decided in the court of common pleas where the suit was commenced. Mr. Justice Strong delivered the opinion of the court, and among other things, said:

"The city ordinances were in question on the ground of their

repugnancy to the inhibition upon the states to make any law impairing the obligation of contracts and the decision was in favor of their vilidity. Nothing else was presented for decision unless it be the question whether the acts of the state legislature authorized the ordinances and that was ruled affirmatively. The jurisdiction of this court over the judgment of the higher courts of the state is not to be avoided by mere absence of express reference to some provision of the federal constitution. Wherever rights acknowledged and protected by that instrument are denied or invaded under the shield of state legislation, this court is authorized to interfere. The form and mode in which the federal question is raised in the state court is of no minor importance if, in fact, it was raised and decided."

In *Satterlee v. Matthewson*, 2 Peters, 410, Mr Justice Washington, delivering the opinion of the court, states clearly the rule to be:

"That if it sufficiently appear from the record itself that the repugnancy of the statute of a state to the constitution of the United States was drawn into question, or that that question was applicable to the case, this court has jurisdiction of the cause under the section of the act referred to, although the record should not in terms state a misconstruction of the constitution of the United States, or that the repugnancy of the statute of a state to any part of that constitution was drawn in question."

In his brief, the counsel for defendant in error cites several cases in support of his contention, but the records in those cases differ from the record in this case in this; that in the former, it does not appear that any questions involving the constitutional rights of the plaintiff in error were litigated or decided by

the state courts, whereas in the latter, there was little else litigated and decided.

The manner in which litigants in state courts should set up or claim their constitutional rights, so as to confer upon the federal supreme court jurisdiction to review the adverse judgments therein, must necessarily depend upon the nature of the rights and the circumstances under which they are involved. Thus, in the anarchist case, cited by opposing counsel, the alleged seizure of the Most letter, even in violation of the constitutional rights of the defendant Spies, could not be involved in a prosecution against him for an alleged crime, except it were specially brought to the attention of the court and made the foundation of an objection to the admission of the letter offered in evidence against him. This, however, was not done and in its opinion the federal supreme court states that it had searched the record in vain for any evidence that such an objection had been made.

As the decisions in the cases noted herein abundantly assure the jurisdiction of this court, it will be unnecessary to consider that part of the opposing counsel's brief wherein he attempts to demonstrate that the questions here urged are not stated in express terms in the record, or necessarily involved in the judgment of the state courts.

Assuming the case to be within the jurisdiction of the court, it is insisted that the judgment of the state supreme court should be affirmed for the reason that the questions now presented have been decided by this court and in support of this contention cites

the case of *New York and New England Railroad Company v. Town of Bristol*, 151 U. S., 556, with the assurance "that there is not a material contention made by this plaintiff in error that was not made and decided adversely to it in the above case. In fact it is of such similar import that the law of one case must be taken as the law of the other."

A careful reading of that case, however, has failed to disclose to counsel for plaintiff in error that it involved a single proposition presented in the case at bar. There the right of the state to amend, alter or repeal the charter of the railroad company was "reserved specifically and under general laws," and furthermore, the company was accorded a protracted hearing before the railroad commissioners, which occupied several days during a period of more than four months and also a full hearing under the laws of the state in the superior and supreme courts thereof.

The exercise of the reserved right of the state under its contract with the company to provide for suitable railroad crossings, could not be affected by the provision of the federal constitution guaranteeing the inviolability of contract obligations. Neither could it be claimed that by such proceedings, the company had been denied the equal protection of the laws or its property taken without due process of law.

Even the contention of the railroad company that the commissioners in the exercise of their powers, had exceeded the limits of reason and justice, pre-

sented no question arising under the federal constitution, for whether the whole or part of the cost of removing the crossing should have been imposed upon the company, was purely a question of fact to be determined under the circumstance of the case, by the commissioners in the first instance, and subsequently by the state courts, and whether or not this question was *correctly* settled, is not a matter for review in the federal supreme court. The federal constitution does not guarantee that the verdicts and judgments of the state courts involving any of its provisions, shall conform to "those general ideas of the requirements of natural justice" which may be entertained here.

But in the case at bar, the questions arising upon the record may be stated:

1. That the act in question—section 48 metropolitan charter—as interpreted by the state supreme court, delegates to the municipalities therein provided for, authority, in cases where two or more railway companies owning or operating tracks across public streets, to impose the cost and expense of constructing and maintaining viaducts over the same, upon either or any of such companies, and that city ordinance number 3752, in execution of such authority, imposes upon two of the four companies named in the record, the entire expense of the repairs in question. This interpretation of the act and the proceedings to enforce it operate to deny the plaintiff in error the equal protection of the law.

2. The act in question contains no provision whatever securing a hearing to interested railroad

companies in the proceedings before the city council for apportionment of burdens, and is also framed in such manner that no hearing whatever can be had before the courts except at the option of the city authorities, and even then a hearing cannot be had without incurring enormous fines and penalties in case of defeat.

3. That a hearing has been, in fact, denied plaintiff in error both in the proceedings before the city council, and also in the subsequent proceedings in the state courts.

4. That the enforcement of the provisions of the act in question and of the city ordinance number 3752 making the same effective against the plaintiff in error, will impair the obligations of the contract under which the viaduct in question was constructed; and will also impair the obligations of the charter contract under which the Omaha & Southwestern Railroad Company was organized and by virtue of which it located, in accordance with the provisions of ordinance 729 of the defendant in error, its track across Eleventh street.

PROPOSITION I.

The act in question—section 48, Metropolitan Charter—as interpreted by the state courts and applied in the proceedings by the city council, deprives the plaintiff in error of the equal protection of the laws.

The record in this case discloses that since 1890, four great railroad corporations have been operating,

each for itself, a line of railroad across Eleventh street upon the tracks located under the viaduct, in the manner and by virtue of the permanent rights and arrangements described in the recital. It also appears that so far as this proceeding was developed in the city council of the defendant in error, it was directed only against two and so far as it has been conducted in the courts, its force is being discharged against only one of these corporations.

It is insisted that each step in this proceeding has been taken in strict compliance with that provision of section 48, wherein the legislature directs what railway companies, if any, may be compelled to erect viaducts and keep them in repair. The provision is: "The mayor and council shall have power to require any railroad company or companies owning or operating any railroad track or tracks upon or across any public street or streets of the city, etc., etc."

The question presented here is, where four independent railroad companies are each operating a separate line of railroad upon tracks across the public street of a city of the metropolitan class, thereby rendering the use of such street dangerous for the public, can the state arbitrarily impose upon two of these companies, the burden of constructing or maintaining a viaduct thereon?

If the state can do this, then under no circumstances can there arise the necessity for an apportionment, for what the state may do in such matters by legislative enactment, it may authorize its municipality to do. Since, therefore, the entire burden may be

imposed upon one or several companies, it may also be imposed upon any or all of them and even in a proceeding to apportion the burden between all the companies, should the result in fact be manifestly unreasonable and unjust, still it could not be so in law.

The act authorizes the taking of property of the citizen for public uses without compensation. If the state has the power to do this, it must be upon the theory that the citizen is either responsible for the danger which makes necessary the improvement provided for, or will be especially benefited by it to the extent of the amount exacted from him in that behalf, or both.

Here are four railway companies, each one engaged in a business, in the manner of conducting which, the state finds the necessity and justification for the act in question. How, then, can the state itself, *arbitrarily select or permit to be selected, two of these companies to the exclusion of the remainder, and impose upon them the entire cost of an improvement made necessary by the business operations of each, and from which each will derive substantially the same benefit?*

Every maxim and principle of constitutional government, sentinels the property of the citizen and guards against the arbitrary exactions of his government, and under no circumstances whatever ought the state to be permitted to arbitrarily compel the citizen to surrender his property for the public good without compensation. That under certain circumstances, it may compel a surrender of private property for public use without compensation, is conceded but

that it can *arbitrarily* do so, is most earnestly denied. Equality before the law is the inspiration and boast of free government. Every seizure of private property for public use must not only be justified as a matter of public necessity, but its appropriation must be made with reference to the established principles of justice and equality. Every time the state ignores these principles it passes the boundary line which separates a constitutional from an arbitrary exercise of power, and not only despoils the citizen of his rights, but also violates the sacred covenant the people have made between themselves and their government. *Is it not enough that one's property may be wrested from him under the plea of state necessity, that the spoliation must be infected with the vice of an arbitrary discrimination?*

There is not a line in the organic act of the commonwealth relating to the imposition of public burdens, which does not reveal the spirit and purpose of the people to equalize among themselves these forced contributions. For instance, revenues needful for general purposes, must be derived through "taxes levied by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or its property and franchises." Revenues for municipal purposes must be recruited by means of "taxes uniform in respect to persons and property within the jurisdiction of the corporation imposing them" while the authority to make local improvements is qualified with the requirement that "special assessments or tax-

ation in that behalf, shall be laid upon the property benefited."

Our libraries are bursting with reported cases in which taxes and special assessments, though imposed in strict compliance with legislative direction, have been denounced by courts because the prescribed method or system contravenes plain principles of justice and equality.

In the present case, the act in question, as construed by the state supreme court, amounts to nothing less than an attempt upon the part of the state to put into the form of a legislative enactment an unjust and arbitrary exaction, and of that class, too, the heaviest that can be borne by the citizens of a free republic. In construing this act the court said:

"Equally groundless is the contention that the city was required to proceed against the Chicago, Rock Island & Pacific and the Chicago, Milwaukee & St. Paul Railroad Companies then engaged in operating jointly with the Union Pacific Company, certain tracks belonging to the latter across Eleventh street and under said viaduct. The statute as we have seen, authorizes the city to require two or more railroad companies, owning or operating separate lines of track, to erect, construct, reconstruct or repair viaducts. If we admit the companies named as lessees of the Union Pacific Company, to be within the terms of the act, it does not follow that they are in any sense necessary parties to the proceeding since the city might still have proceeded against the owners of the tracks operated by them. Such is the plain and necessary inference from the language of the statute."

That the legislature may vest in cities of the metropolitan class, power to compel railway com-

panies, in certain cases, to build and maintain viaducts may, for the purpose of this argument, be conceded, but that it may vest in these municipalities authority to discriminate between the railway companies subject to the exercise of the power, is denied. Indeed, such an attempt, would be a usurpation of authority which can find neither support or justification within the domain of constitutional principles. *This would amount to the taking by legislative enactment, of the property of one citizen for the benefit of another citizen.*

As was said by Justice Field in the *County of Santa Clara v. Southern Pacific Railroad Company*, 18 Fed. 392:

> "It would be difficult to state any principle which would justify the exaction from one of a tax leviable on the interest of another. No power in any state has ever been asserted going to that extent except the power to confiscate. The exaction would not be the taking of property by due process of law. * * * It would be sheer spoliation by arbitrary power."

In his work on Constitutional Limitations, Judge Cooley states the principle he deduces from the adjudication of the courts as follows:

> "Equality of rights, privileges and capacities unquestionably should be the aim of the law, and if special privileges are granted or special burdens or restrictions imposed in any cases, it must be presumed that the legislature designed to depart as little as possible from this fundamental maxim of government."

The plaintiff in error does not *here* complain of an unjust and inequitable apportionment by the city authorities, for by the very terms of the enactment

under consideration, this was *authorized*. It does, however, insist that the state could neither exercise such authority nor delegate its use to a municipality without violating the provisions of the federal constitution and particularly the one last above quoted. In the present instance, however, no attempt was made to apportion the burden or cost among *all* the railway companies concerned, for those not included in the proceeding were intentionally ignored because in the opinion of the city authorities, this was not required. In this connection it may, however, be suggested that the application of the act, as construed by the state courts, to the circumstances of this case, has resulted in imposing upon the plaintiff in error an unjust and unreasonable burden.

It is conceded that there are twenty-two tracks located across the street under the viaduct in question, of which the plaintiff in error owns and operates one only; also that the number of its trains daily operated on its track do not exceed the number of trains operated by either of the other companies upon the remaining tracks and it even falls far short of the number operated by one of them. Consequently, to apportion one-third of the cost of the repairs to it is an outrage both upon law and mathematics. In making this apportionment, it was not necessary to theorize or speculate. It simply involved a matter of calculation. In this view, it is immaterial which one of several methods be used to work out the problem. The result places upon the plaintiff in error an unequal and unjust burden and amounts in fact to the

taking of its property for the benefit of other companies.

Indeed, the learned judge before whom this case was heard in the district court, speaking of the apportionment, said:

"Under this state of facts, it seems to me that the arbitrary requirement of the absolute repair of one-third of the viaduct in question is inequitable."

This result is referred to for the purpose only of illustrating the effect of the unjust and unreasonable discrimination *provided for by the act itself.*

PROPOSITION 2.

Section 48 aforesaid and the proceedings thereunder operate to deprive the plaintiff in error of its property without due process of law and to deny it the equal protection of the laws.

The record herein discloses that under a resolution to that effect, the board of public works prepared the plans and specifications for the repair of the viaduct in controversy, which were submitted to and approved by the mayor and city council as required by section 48; that on January 30, 1894, the city council passed an ordinance in which the Union Pacific company and the respondent were directed to repair the viaduct in accordance with these plans and specifications, the former company to repair the north two-thirds and the latter the south one-third thereof; that afterwards these companies were notified of the action of the city council and ordered to proceed at

once to furnish the necessary repairs. The companies having refused to comply with the order, the defendant in error subsequently brought this suit in the district court of Douglas county, Nebraska, *and upon the hearing the court refused to review the proceedings of the city council with respect to the apportionment or to decide the question as to whether or not it was unreasonable, inequitable and unjust.* No notice whatever was given either of the railway companies of the proceeeding before the city council and *neither of them was given an opportunity for a hearing with respect thereof, either before the city council or in the courts of the state.*

In *Hagar v. Reclamation District*, 11 U. S., 572, the United States supreme court, after referring to the several kinds of taxes and assessments concerning which notice was not required, and the reasons therefor, said:

> "But where a tax is levied on property not specifically but according to its value to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially."

If the duties of the assessor in valuing property for the purpose of general taxation, are judicial, then certainly are those duties performed by boards of commissioners or other special tribunals provided for in acts authorizing the cost of public improvements to be assessed against the property of private citizens, on account of supposed benefits or for other reasons.

Hagar v. Reclamation District, 111 U. S., 572;

Cooley, Taxation, 266;

Burroughs, Taxation, § 102;

Barhyte v. Shepherd, 35 N. Y., 238, 250;

Hassan v. Rochester, 67 Id., 528, 536;

Stuart v. Palmer, 74 Id., 183;

Williams v. Weaver, 75 Id., 30, 33;

Jordan v. Hyatt, 3 Barb., 275, 283;

Ireland v. Rochester, 51 Id., 416, 430, 431;

State v. Jersey City, 24 N. J. L., (4 Zab.) 662, 666;

State v. Morristown, 34 Id., 445;

Griffin v. Mixon, 38 Miss., 434, 437, 438.

The proceedings by the mayor and city council, involves an investigation of facts, and a judgment after a hearing.

In this proceeding the railway companies *only* have a direct pecuniary interest. The state itself can have no such interest, because so long as the proceeding is sanctioned by legal and constitutional principles it is *financially* immaterial to the state whether the burden or cost assigned to either of the companies be more or less than it should be. Nevertheless, the state is vitally concerned, *for herein, if at all, must it find justification and support for the seizure of private property.* It is therefore a judicial proceeding of the highest character, for the judgment involves not only the rights of private property as between the railway companies themselves, but also the authority and jurisdiction of the state to compel the contribution. Such a proceeding, therefore, without notice to those concerned, and without giving them an opportunity

to be heard, violates every maxim and principle of constitutional government.

Stuart v. Palmer, 74 N. Y., 193;

Overing v. Foote, 65 N. Y., 269;

Thomas v. Gain, 35 Mich., 155, 164;

Jordan v. Hyatt, 3 Barb., 275, 283;

State v. Jersey City, 24 N. J. L., 662, 666;

State v. Plainfield, 38 N. J. L., 97;

Patten v. Green, 13 Cal., 325;

Griffin v. Mixon, 38 Miss., 438;

San Mateo Co. v. Railroad Co., 8 Sawy., 238;

Santa Clara Co. v. Railroad Co., 18 Fed. Rep., 385;

Darling v. Gunn, 50 Illinois, 424;

Gatch v. Des Moines, 63 Ia., 718;

Trustees v. Davenport, 65 Id., 633;

Uhlmore v. Baltimore, 21 Atl. Rep., 711;

Boorman v. Santa Barbara, 4 Pac. Rep., 31;

Campbell et al. v. Dwiggins, Treas., 83 Ind., 473;

State v. Newark, 25 N. J. L., 399;

City of St. Louis v. Hill, 22 S. W. Rep., 861;

Bradley v. Irrigation Dist., 68 Fed. Rep., 948, 963.

There are numerous decisions of the United States supreme court in which consideration has been

given to what constitutes due process of law within the meaning of the federal constitution, with respect to the validity of tax laws and tax proceedings. While there can be found no deliverance of that court with respect to that question which in any way controverts or even qualifies the contention of the respondent herein, it should be observed that the present dispute concerns questions of a fundamental character which might not for various reasons, be made the subject of controversy in the federal supreme court in cases involving the validity of taxes under state laws and carried there from the sustaining judgments of state courts solely with reference to whether or not an opportunity for a hearing had been given. The case of *McMillen v. Anderson*, 95 U. S., 37, 24 L. ed., 335, is one of the class alluded to. In that case Anderson was a tax collector for the parish of Carroll in the state of Louisiana; he had seized the property of McMillen and was about to sell it for the payment of his license tax, to which persons, engaged in certain kinds of business were liable to the extent of one hundred dollars. In accordance with the laws of Louisiana, McMillen brought a suit in the proper court of the state, for the trespass and in the same action obtained a temporary injunction against the sale of the property seized, whereupon Anderson answered that the seizure was for taxes due and it was what his duty as collector required him to do. The defense was sustained and judgment given under the statute against McMillen and the sureties on his bond for double the amount of the tax and costs. McMillen thereupon appealed to the supreme court of Louisiana and in his appeal alleged that the

law, under which the proceedings of Anderson were had, was void, because it was in conflict with the constitution of Louisiana and of the United States and specifically opposed to the provision of the fourteenth amendment of the latter, which declares that no state shall deprive any person of life, liberty, or property, without due process of law. The state courts having sustained the law and the proceedings thereunder the suit was subsequently presented to the supreme court of the United States upon the single proposition that the seizure of the McMillen property was without due process of law, because he was denied his day in court. In considering the question presented, the court held that the judgment of the supreme court of Louisiana should be taken as conclusive on all questions mooted in the record except the one relating to the provision of the fourteenth amendment, and proceeded to determine whether or not the laws of the state afforded him due process of law within the meaning of the federal constitution, and as applied to the nature and circumstances of the case. Its judgment was, as stated in the head notes prepared by Justice MILLER, that:

> "A statute which gives the tax payer a right to enjoin its collection and have the validity of the tax decided by a court of justice, is due process of law notwithstanding it requires the party to give security in advance as in other injunction cases."

In that case the taking involved an exercise of the legislative and administrative powers only. The validity of the law and the regularity of the proceedings under it were settled by the state courts. Con-

sequently, speaking with reference to the jurisdiction of the federal authority, nothing could deprive the tax payer of due process of law in that proceeding except the closing of the doors of the court upon him. But as he was in court litigating all of the questions he desired to raise he was not deprived of his property without due process of law. And it may also be observed that it is difficult to perceive how the plaintiff in error was deprived of his property without due process of law even when viewed from the standpoint of the state courts. The authority of the state to lay the tax in dispute could hardly be questioned, for, without doubt, a state may tax its citizens on account of their business or property within its jurisdiction. This power is implied in the very existence of the state itself. It is an attribute of sovereignty and no divorcement can be decreed between them without involving both the social and political fabric in a common destruction. With regard to the validity of the legislation in that controversy, a tax of a certain fixed amount being directly imposed by the legislature upon every person engaged in a certain kind of business, there could be no occasion for a judicial inquiry, either for the purpose of making an apportionment or estimating the benefits to property or business assessed, consequently the only question which could arise under such legislation would be with respect to the execution of it by the officer.

The supreme court of the United States has, however, upon several occasions, explored the meaning of due process of law as applied to cases in which questions similar to those under consideration were pre-

sented. In the case of *Davidson v. The Board of Administrators of New Orleans*, 96 U. S., 97, the assessment of the real estate of the plaintiff in error in the city of New Orleans for draining the swamps of that city, was resisted in the state courts and was brought to the federal supreme court by writ of error, on the ground that the proceeding deprived the owner of his property without due process of law. The court held in that case that when such a burden or the fixing of a tax or assessment by the statute of the state is required to be submitted to a court of justice, *before it becomes effectual* with notice to the owners, the right on their part to appear and contest the assessment is due process of law within the meaning of the constitution. In speaking of the necessity for a hearing the court stated that:

> "*Before the assessment in question could be collected or become effectual*, the statute required that the tabulated assessment should be filed in the proper district court of the state; that personal service of notice for a reasonable length of time should be served on all owners who are known or within reach of the process and due advertisement made as to those who were unknown or could not be found. This was complied with and the party complaining here appeared and had a full and fair hearing in the court in the first instance and afterwards in the supreme court. If this be not due process of law, then the words can have no definite meaning as used in the constitution.

In *Hagar v. Reclamation District* 111 U. S., 701, 715, it appears that in 1868 the legislature of California passed an act, by virtue of which a general system was established for reclaiming swamps and overflowed salt marsh and tide lands in the state,

thus fitting them for cultivation. One of the provisions of the act required the supervisors, at a certain stage of the proceedings, to appoint three commisioners who were to jointly view and assess upon each acre to be reclaimed or benefited, a tax proportionate to the whole expense, and to the benefits which would result from the works. This tax was to be collected and paid into the county treasury, and placed to the credit of the district, etc. The commissioners were also required to make a list of the amounts due from each owner of land in the district and of the amount assessed against the unsold land and file the same with the treasurer of the county in which the lands were situated. The lists thus prepared were to remain in the office of the treasurer for thirty days, or longer if so ordered by the trustees; during which time any person could pay the treasurer the amount assessed against his land, but if at the end of thirty days or the extended time, the tax had not been paid, the treasurer was to transmit the list to the district attorney, *who was to proceed at once against the delinquents in the manner provided by law for the collection of state and county taxes.* The appellant having refused to pay the tax assessed against his property, suit was brought by the district attorney against him in the proper court and thence removed to the circuit court of the United States. One of the contentions of the appellant was that in making the assessment upon his property no notice was given nor an opportunity afforded him, to be heard respecting it, the law containing no provision for such notice or hearing. It was, therefore, claimed that for want of such notice and

hearing, the proceeding in which his land was assessed, amounted to a taking of his property without due process of law.

This contention the court, however, refused to sanction and assigned in support of its judgment the same reasons urged in its decison in *Davidson v. New Orleans*, 96 U. S., 97. It said:

"The assessment under consideration could, by the law of California, be enforced *only by legal proceedings*, and in them any defense going either to its validity or amount could be pleaded. In ordinary taxation, assessments, if not altered by a board of revision or of equalization, stand good, and the tax levied may be collected by a sale of the delinquent's property; but assessments in California, for the purpose of reclaiming overflowed and swamp lands, can be enforced only by suits and, of course to their validity it is essential that notice be given to the taxpayer and opportunity be afforded him to be heard respecting the assessment. In them he may set forth, by way of defense, all his grievances. *Reclamation District No. 108 vs. Evans*, 61 Cal., 104. If property, taken upon an assessment, *which can only be enforced in this way*, be not taken by due process of law, then, as said by Mr. Justice MILLER, in the New Orleans case, these words, as used in the constitution, can have no definite meaning. The numerous decisions cited by counsel, some of which are given in the note, as to the necessity of notice and of opportunity of being heard are all satisfied where a hearing in court is thus allowed.

In the case of *Bradley et al. v. Fallbrook Irrigation Dist. et al.* 68 Fed., 948, 966, the circumstances and decision of the court are briefly given in one of the head notes as follows:

"A state statute providing for the creation of irrigation districts

of such extent as to comprise lands susceptible of one mode of irrigation, from a common source and by the same system of works, upon the petition of 50 or a majority of the land owners therein, confirmed by a vote of two-thirds of the qualified voters residing within the district, with power to issue bonds, levy assessments to pay the same, and to condemn lands for the construction of canals, works, etc., cannot be sustained under the power to make assessments for local improvements, where the county supervisors to whom the petition is to be addressed have no authority to adjudicate upon the merits thereof, and no opportunity is given to landowners to contest the validity of the petition, or the proceedings thereunder, which may finally result in the taking of private property. Such a statute is invalid as authorizing the taking of private property without due process of law; nor can this fatal defect in the foundation of the proceedings, be cured by the fact that each landowner is entitled to be heard in determining the valuation of his land for purposes of assessment, or by the fact that, by an amendatory act (St. Cal., 1889, 212) the board of directors of an irrigation district are, *in their discretion*, authorized to institute a special proceeding in the courts to determine the validity of the proceedings, previously had, organizing the district, on publication of notice, and with the right in any person interested to appear and contest the same."

These decisions of the federal courts, and there are numerous others, make clear and emphatic that when a proceeding by which private property is to be taken for public use requires an investigation and judgment concerning the existence of certain facts and conditions essential to further proceedings, or in other words, necessary to the jurisdiction and authority of the state or municipal body, notice thereof

must be given the parties interested and an opportunity afforded them to be heard in their own behalf. It may not, however, be absolutely necessary that the hearing in a tax proceeding relating to special assessments shall be had at any particular stage thereof so that it be had *before it becomes effective*, still, if regard be had to established usage or to the nature of the proceeding and the object in view, it would seem to be the part of legislative wisdom as well as a matter of public necessity that a hearing should be afforded at *the time of the inquiry and before judgment is had.* Be this as it may, there can be no doubt that a hearing must be afforded *before the proceeding of which the judicial inquiry is a necessary part, becomes effective. If, before such hearing it becomes, or may become operative even for an hour and upon the slightest fraction of the property rights of the citizen it would amount to a taking of property without due process of law.* The legislative enactments referred to in the Davidson and Hagar cases made judicial proceedings *absolutely essential* to the seizure of property under them. No property could be taken except by virtue of an order or process issued in a proceeding instituted for that purpose in the courts of the state. Thus were the property owners assured of their rights to be heard not at the *mere pleasure* of the state or of the municipal body, but as a matter of absolute *right or necessity*, for after refusal upon their part the state or the municipality had no choice but either to *abandon* the tax altogether *or to institute proceedings in the courts to collect it.*

In *The State v. Newark*, 25 N. J. L., 399, *supra*,

an attempt was made to collect certain assessments imposed upon private property on account of supposed benefits, the same to be applied toward the construction of sewers in Newark, New Jersey. The assessment was made by the muncipal corporation, no notice thereof being given to those upon whom it was made to enable them to be heard in opposition to, or in review thereof. In its opinion the court states:

"*Second.* The prosecutors had no notice of these proceedings, except notice to pay their assessments, no opportunity to be heard before the commissioners as to the propriety of being assessed at all, or as to the amount of the assessment, nor of being heard before the counsel, or any other appellate tribunal, in opposition to or review of the assessments, the reports of assessments having been confirmed by the council at the same meeting they were presented. This is contrary to all our ideas of natural justice, and contrary to the well settled legal principle, that 'whenever a court, or any person acting under legal authority, is to act judicially, or to exercise a discretion in a matter affecting the rights of another, the party thus to be affected is to have reasonable notice of the time and place when and where such act is to be done to the end that he may be heard in defense, or for the protection of those rights. This is the language of Ch. J. HORNBLOWER in delivering the opinion of the court in *The New Jersey Turnpike Co. v. Hall et al.* 2 Harr., 337. He says that no principle or rule of action is better settled at the common law than this, and he is fully sustained by the following, among other cases that might be cited:

Hess et al. v. Cole 3 Zab., 116;

Coster et al. v. New Jersey Railroad Co., 3 Zab, 227;

Vail v. Morris & Essex Railroad Co., 1 Zab., 191;

Youngs v. Overseers, &c., 2 Green, 517;

Matter of Flatbush avenue, 1 Barb., 286;

Jordan v. Hyatt et al., 3 Barb., 275;

Owners, &c., v. Mayor, &c., of Albany, 15 Wend., 374;

Vantilburgh v. Shann, et al, 4 Zab.;

The State (Mann, prosecutor,) *v. Jersey City*, already cited."

In *Stuart v. Palmer*, 74 N. Y., 183, the act of the legislature authorized the commissioners therein provided for to ascertain what land within the district of assessment was benefited and to apportion and assess the amount required upon such land in proportion to the benefits. The assessment when made was *to be a lien upon the land*, and its payment could be enforced by the sale thereof. No notice was required to the owners of the land to be benefited and assessed. The court speaking with reference to the questions under consideration, said:

"I am of the opinion that the constitution sanctions no law imposing such an assessment *without a notice to, or a hearing, or an opportunity of a hearing, by the owners of the property* to be assessed. It is not enough that the owners may by chance have notice, or that they as a matter of favor have a hearing. *The law must require notice to them or give them a right to a hearing and an opportunity to be heard.* It matters not upon the question of the constitutionality of such a law that the assessment has in fact been fairly apportioned. The constitutionality and validity of the law is to be decided not by what has been done under it *but what may by its authority be done.* The legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice."

The state has made no attempt to impose by di-

rect legislative enactment any duty whatever upon railway companies with respect to the construction and maintenance of viaducts.

It has merely delegated to cities of the metropolitan class authority, under certain circumstances, to do so. So far, therefore, as the construction and maintenance of viaducts can be compelled by the exercise of legislative and administrative powers, the city may proceed without notice or an opportunity for a hearing being given, provided the right to contest the validity of the law and the proceedings under it, in the courts of the state, be not denied. This may possibly be the case where only a single railway company is interested, for then, if the requirements of the act be observed, the taking would involve only the exercise of legislative power by the legislatures of the state and of the city. There would be no occasion for the exercise of judicial authority. But when two or more railway companies are concerned, the legislative power is *exhausted* when the location, character and cost of the viaduct are determined by the mayor and city council. The very next step involves a *judicial inquiry* into circumstances and conditions for the purpose of ascertaining the share of each company in the *common responsibility* for the very danger in which originates the necessity and power of the municipality to further proceed. This determination practically fixes the proportion of the common burden or costs each company should carry. In this inquiry and judgment therefore is fixed the *foundation of the proceeding by which* private property is to be taken for

puplic use. By this means only, can the state or the city acquire any power or jurisdiction whatever over the property of the railway companies for the purposes aforesaid.

Except when necessary to the moral or physical safety of the community the state has no right or power to take private property for any purpose without compensation to the owner thereof. As to taxes for general or local purposes, the taxpayers are presumed as a matter of law, to receive compensation for the burdens thus imposed in the protection and benefits afforded by the governments, general or local, under which they live. As to local improvements, they may be authorized and the expense thereof assessed upon the lands benefited, but in such cases benefits are not to be presumed as a matter of law, but established as a matter of fact. The *legislature* cannot determine whether or not public improvements will *specially* benefit certain property. This can be done only through the exercise of *judicial power*, and however important the exercise of legislative and administrative powers may be to the taking of private property it cannot be accomplished without also including the use of the judicial power.

The language of the court in *Stuart v. Parmer* is apt:

> "It must be conceded that property cannot be taken by the right of eminent domain, without some notice to the owner, or some opportunity on the part of the owner, at some stage of the proceeding, to be heard, as to the compensation to be awarded him. An act of the legislature, arbitrarily taking property for the public good, and fix-

ing the compensation to be paid could not be upheld. There would in such case be the absence of that 'due process of law' which both the federal and state constitutions guarantee to every citizen. Can it be, when the public takes land for a public highway, the owners thereof are entitled to a hearing as to the compensation which they are to receive, and yet the lands on both sides of the highway may be assessed to pay such compensation to their entire value, without any opportunity on the part of the owners to be heard?

"The legislature can no more arbitrarily impose an assessment for which property may be taken and sold, than it can render a judgment against a person without a hearing. It is a rule founded on the first principles of natural justice older than written constitutions, *that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights*, and the constitutional provision that no person shall be deprived of these 'without due process of law' has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the federal constitution. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty or property. This the legislature cannot do or authorize to be done. 'Due process of law,' is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty or property, whether the proceedings be judicial, administrative, or executive in its nature. *Weimer v. Brueinbury*, 30 Mich., 201. This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights."

The principle that a citizen shall not be deprived of his property without an opportunity to be heard in defense of his rights applies where private property

is to be taken through the exercise of the police power. If a citizen may be compelled to surrender a portion of his property to redeem a community from a danger, *he with other citizens has created*, the amount thus required of him cannot exceed his contribution to such danger without reducing, by the amount of such excess, the burdens of the other citizens. Such an exaction would, in the language of Mr. Justice FIELD, be "sheer spoilation by arbitrary power." The same reason therefore which would require an apportionment in the matter of special benefits would operate in cases involving the exercise of the police power.

Against the iniquity of unequal and unjust public burdens the people have chosen to protect themselves through their governments and it is recognized as a principle of general application that all forms of taxation and assessments under free governments must be as nearly as practicable uniform and equal. As said in *Stewart v. Palmer*, "taxation and assessment imply apportionment; each person must share the burdens of taxation and assessment *equally* with all others in like situation."

Assessments for local improvements can be justified only upon the theory that the lands upon which they are laid, are especially benefited by the improvements for which they are laid and hence ought to bear the burden rather than property generally, and if a law should authorize such assessments to be laid without reference to benefits it would either take property for the public good without compensation or it would take property from one person for the direct

benefit of another and in either aspect it would be unconstitutional.

Kirby v. Shaw, 19 Penn., 258;

Schenley v. Commonwealth, 36 Id., 29;

McGonigle v. Alleghany City, 44 Id., 118;

In the matter of Washington Avenue, 69 Id., 360;

Patterson v. Society, etc., 24 N. J., 385;

Tide-water Co. v. Coster, 18 N. J., Eq., 519;

In the matter of the Drainage of Lands, 35 N. J., 497;

St. John v. East St. Louis, 50 Ill., 92;

Lee v. Ruggles, 62 Ind., 427;

In the matter of Albany Street, 11 Wend., 149;

Litchfield v. Vernon, 41 N. Y., 123.

So with regard to assessments for local improvements necessary to secure the safety of the community, they are to be laid, *if at all*, upon the individuals creating such necessity, and a law authorizing them against any number *less than all concerned*, would either take property for the public good without compensation, or from one person for the direct benefit of another and in either aspect, it would be unconstitutional.

If, for such purposes private property cannot be taken without giving the proprietors thereof an opportunity to be heard, it may be asked if this valuable constitutional right is not secured to them by the very terms of the act in question. The provisions in

that respect are: that if the railway companies shall neglect or refuse to construct or repair the viaducts within the time and manner required by the mayor and council, such failure or refusal shall constitute a misdemeanor and upon conviction the companies shall each be fined $100, and each day of such failure and neglect shall be deemed a separate and distinct offense; also, the companies may be compelled by mandamus or other appropriate proceeding, to construct or repair these viaducts, or the city may proceed to construct or repair them by contract, or in any other manner, it may by ordinance provide for, and assess the cost thereof against the property of the railroad companies required to erect or repair the same, *which cost shall be a valid and subsisting lien against such property and also a legal indebtedness of said companies, in favor of the city, which may be enforced and collected by a suit in court.*

Upon the refusal of the railway companies to perform the duties required, it is entirely *optional* with the city whether it shall enforce the same by suit or proceed by contract or otherwise, to construct or repair the viaducts. Should it elect to do the latter, the companies would thereby become indebted to the city to the amount of the cost thereof, which would by operation of the statute, become a lien upon their properties, and whether mandamus proceedings be instituted or the work undertaken by the city, the act becomes *immediately effective*, at least to the extent of making each day's neglect or refusal a misdemeanor, for which all of the companies may be prosecuted and upon conviction thereof, fined $100. The

mayor and city council may, therefore, *at their election*, authorize an apportionment which may create a lien upon the properties of the railway companies concerned and also deprive them of the enjoyment of their liberty to the extent of loading it with a penalty of $100 a day, and this without any possible opportunity for a hearing. The constitutional assurance that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard is the most important guaranty contained in the federal and state constitutions. In this the citizen has an *absolute right which cannot be made to depend upon the caprice or interest of a municipality.*

Speaking with reference to this question, Ross, Circuit Judge, in *Bradley v. Fallbrook Irrigation Dist.*, 68 Fed. Rep., 948, said:

> "In the present case, however, as has been shown, the owner whose property is authorized to be taken, is not afforded any opportunity whatever, at any time or place, before any board or tribunal, to question the sufficiency of the very thing that lies at the foundation of the whole proceedings. This vital objection to the legislation in question is in no manner answered by the fact that, by a supplemental act of the legislature of California, approved March 16, 1889, (St. Cal., 1889, pp. 212, 213) the board of directors of any irrigation district is authorized to commence a special proceeding in a superior court of the county in which the lands or some portion thereof are situated, in which, after the publication of notice of the proceeding, any person interested may come in and contest the legality and validity of each and all of the proceedings for the organization of said district under the provision of said act, from and including the petition for the organization of the district, and all other proceedings

which may affect the legality or validity of said bonds and the order for the sale and the sale thereof. *Such a proceeding may or may not be instituted by the board of directors of the district*, and was not instituted on the present instance, so far as appears from the bill. *No man's constitutional rights can depend upon an option which may or may not be exercised by another.*"

That a proceeding which creates an indebtedness against private property and secures payment by a lien thereon amounts to a taking of property within the terms of the constitutional guaranty, can admit of no doubt. In *Stuart v. Palmer*, it was said:

"No case it is believed, can be found in which it was decided that this constitutional guaranty did not extend to cases of assessments, and yet we may infer from certain dicta of judges, that their attention was not called to it, or that they lost sight of it, in the cases which they were considering. It has sometimes been intimated that a citizen is not deprived of his property within the meaning of this constitutional provision by the imposition of an assessment. It might as well be said that he is not deprived of his property by a judgment entered against him. A judgment does not take property until it is enforced, and then it takes the real or personal property of the debtor. So an assessment may generally be enforced not only against the real estate upon which it is a lien; but as in this case against the personal property of the owner also, and by it he may just as much be deprived of his property, and in the same sense as the judgment-debtor is deprived of his by judgment."

In *Brady v. King et al.*, 53 Cal., 45, an attempt was made by the legislature to ratify and confirm certain defective ordinances by which it was attempted to confer upon a board of supervisors power

or jurisdiction to order certain street work done. It was held that the act was in violation of the constitution of the state and therefore void. The court said:

"As the attempted assessment was absolutely void, the act of the legislature was an attempt to levy a contribution within a certain district, and to declare that each lot named in the original roll should pay a sum arbitrarily fixed. This would be to create a lien on defendant's real estate, which, if the law were valid, the courts would be compelled to enforce.

"If this can be done, the legislature may take the property of the citizen without any legal process, for there can be no difference between *taking the property directly and imposing a lien upon it.* But no person 'can be deprived of life, liberty or property without due process of law.' (Constitution, art. 1, sec. 8).

"The act of the legislature is an attempt, at best, to levy an assessment within the city. The legislature has no power to levy such assessment. (*Taylor v. Palmer*, 31 Cal., 240; *People v. Lynch, supra*)."

It is, however, needless to multiply arguments or authorities. It can hardly be possible that an act which, while encumbering the property of a citizen with an indebtedness—the equivalent of a fortune—and imposing upon his freedom an arbitrary tax of $100 a day, is so framed as to practically deny him all appeal to the courts to secure him in the possession and enjoyment of his constitutional rights, can receive the sanction of the courts of the people whose institutions constitute an absolute pledge against the exactions of arbitrary power and whose vocabulary has long since been exhausted in proclaiming the inviolability of personal rights.

Even if it could be supposed that the provision

giving the city the right at its option, to compel by writ of mandamus, the construction or maintenance of viaducts, as qualified by the other provisions of the section, meets the constitutional requirements in that behalf, still, so far as the present suit is concerned, the *plaintiff in error has been absolutely denied a hearing or determination with respect to the apportionment in question.* This suit is brought here upon a writ of error for the purpose of reviewing the decision of the state supreme court affirming the judgment of the trial court, in which the judge, though finding as a matter of fact that the apportionment was inequitable and unjust, refused to review the action of the mayor and city council in making the same. A reference to the concluding paragraph of the printed opinion of the trial judge will perhaps afford the clearest demonstration of this statement. Rec. 33.

> "Under this state of facts it seems to me that the arbitrary requirement of the absolute repair of one-third of the viaduct in question is inequitable, but the power to so require is vested by the legislature absolutely in the city council, yet the supreme court of this state, in the case of *Hanscom v. Omaha*, 11 Neb., 42, refused to sanction the absolute authority of the city council upon a question of like import. I do not now intend to decide whether the requirement in behalf of the city, is equitable and just or not. So far as I may, and make this order final, I desire to reserve that question for future consideration, and if, in the judment of the supreme court, the solution arrived at by me is correct, then the question of determining the proper proportion to be borne by this respondent, in view of the above facts, will be further considered and ultimately determined. With this simple expression of what

> I deem should be the ultimate result of this case, the writ of mandamus will issue as prayed."

The solution of this question, vital to the authority and jurisdiction of the city and involving the constitutional rights of the plaintiff in error, is thus expressly reserved, notwithstanding the finding of fact by the court, until after the viaduct is repaired.

Even if the court desired to do so, it is difficult to understand how, upon a hearing of an application of a writ of mandamus and in the absence of necessary parties, it could have reviewed the action of the city authorities and reapportioned the burdens in accordance with the requirements of equity and the law, for in the distribution of a common burden, the share of one must necessarily depend upon the share of the others and the judgment of a court to be final and conclusive, should be binding upon all concerned.

In this connection, the attention of the court is particularly called to the following provision of the act under consideration;

> "It shall be the duty of any railroad company or companies upon being required as herein provided, to erect, construct, reconstruct or repair any viaduct, to proceed within the time and in the manner required by the mayor and council, to erect, construct, reconstruct or repair the same, *and it shall be a misdemeanor for any railroad company or companies to fail, neglect or refuse to perform such duty, and upon conviction any such company or companies shall be fined one hundred dollars, and each day any such company or companies shall fail, neglect or refuse to perform such duty shall be deemed and held to be a separate and distinct offense.* * * * " (Rec. p. 10.)

A notice was served on the plaintiff in error in

accordance with the requirements of the provision just quoted, in January, 1894, by delivering to the company a certified copy of ordinance number 3752. The requirements of section 2 thereof, so far as they affect the plaintiff in error, are as follows; (Rec. p. 10).

"And the Chicago, Burlington and Quincy Railroad Company, grantee and successor to the Burlington and Missouri River Railroad Company in Nebraska, and the Omaha and Southwestern Railroad Company, be and is hereby ordered, directed and required to repair that portion of said Eleventh street viaduct commencing at the south end thereof and extending northward to a distance of one-third of the entire length of said viaduct. The said repairs to be made in accordance with said plans and specifications and to be under the supervision of the city engineer. *The said repairs to be commenced without unnecessary delay and fully completed as herein required, within ninety days from the passage and approval of this ordinance.*" (Rec. p. 11.)

It is obvious, therefore, that by the terms of section 48 and the provisions of the ordinance and notice just quoted, the plaintiff in error will be, ere a final judgment is reached in this suit, delinquent by a period of three years and liable to fines and penalties in an amount exceeding $100,000, and this enormous fine can be imposed upon it as a penalty for the delay occasioned by its appeal to the courts, for security against the invasion of rights guaranteed to it by the provisions of the federal constitution.

To the objection that the act authorized the appropriation of the property of the plaintiff in error without due process of law, the state supreme court in its opinion (rec. p. 84,) declares that:

"It does not authorize the appropriation of the respondent's

property without due process of law in a constitutional sense, since the latter is able to invoke the equal protection of the law by any appropriate proceeding and because it did in fact put in issue by the answer, both the validity of the ordinance and the reasonableness of the amount apportioned to it for the repair of the viaduct in question."

It is, however, submitted that the right to litigate in the courts should be as free to the plaintiff in error as to any other citizen and that when it is denied a hearing involving a few hundred or a few thousand dollars, unless it is willing to assume the enormous risk of fines and penalties which may in the event of defeat aggregate two hundred thousand dollars, it cannot be said that the courts are open to it on equal terms with other citizens. Such enormous penalties close the doors of the courts, almost as effectually as if they were closed by express provision of the statute.

Upon these considerations, therefore, it is respectfully submitted:

1. That the act itself is void as authorizing the taking of private property for public use without affording the owners thereof an opportunity for a hearing.

2. That in this instance, the proceeding by the city is an attempt to appropriate the property of plaintiff in error for public use without affording it a hearing.

3. That the plaintiff in error has been denied a hearing by the courts as to the question respecting the apportionment.

PROPOSITION 4.

The enforcement of the provisions of section 48 and of city ordinance No. 3752 making it effective against the plaintiff in error, will impair the obligations of the contract under which the viaduct in question was constructed, and will also impair the obligations of the charter contract under which the Omaha & Southwestern Railroad Company was organized and by virtue of which it located, in accordance with the provisions of Ordinance No. 729, its track across Eleventh street.

The viaduct in question was built under a contract authorized by the act of 1885, and executed on the 1st day of February, 1886, between the city of Omaha, the Union Pacific Railway Company and the plaintiff in error, these companies at that time owning and operating the tracks across this street. (Rec. p. 22).

By the terms of this agreement, the railroad companies were to contribute three-fifths of the entire cost of constructing the viaduct along Eleventh street and three-fifths of the damages to abutting property on account of the construction thereof, not otherwise provided for by waivers or private contributions, the entire cost and damages not to exceed the sum of $90,000.

Under the act of 1885, and subsisting laws, general and special, cities of the first class were authorized, upon certain conditions, to build and maintain viaducts upon streets occupied by railroad tracks. One of these conditions related to con-

struction only, and was that the railroad companies owning the tracks aforesaid should furnish three-fifths of the cost of the viaduct and three-fifths of the damages resulting to abutting property owners from the construction thereof. Hence an arrangement, pursuant to the act aforesaid, amounted in fact to an agreement between the city and the contracting railroad companies, by which the former was to receive a large pecuniary assistance in the performance of the duties and obligations devolving upon it as a municipality, and the latter a valuable aid in the conduct of its business.

If the state had the power to authorize contracts for the construction of viaducts through private aid contributed on account of and solely for the special pecuniary advantage which the contributor would derive therefrom, then clearly the city would be bound to make good its obligations whether derived through the express terms of the contract or implied from the public laws subsisting at the time of its execution.

The duty of cities with respect to maintaining their streets has been recognized and affirmed by the supreme court of Nebraska for many years. Of the numerous decisions in that behalf, reference is made to the following:

City of Lincoln v. Walker, 18 Neb., 244;
Plattsmouth v. Mitchell, 20 Id., 228;
Foxworthy v. Hastings, 25 Id., 133;
City of Lincoln v. Smith, 28 Id., 762;

Kinney v. Tekamah, 30 Id., 605;

City of Omaha v. Randolph, 30 Id., 699.

A viaduct is unquestionably a part of the street upon which it is located. It is, in fact, an elevated street, established and used for street purposes and substituted for the part of the original street under it as a matter of convenience and safety. The use alone of the viaduct by the public for street purposes would impose upon the city the obligation to maintain it in safe condition for such use.

Plattsmouth v. Mitchell, 20 Neb., 228;

Kinney v. Tekamah, 30 Id., 605;

Foxworthy v. Hastings, 25 Id., 133.

Although no express stipulation to this effect was made in the contract, it was certainly within the contemplation of the parties that the viaduct therein provided for, should be built in accordance with the provisions of the act of 1885. It is equally certain that it was within the contemplation of the parties that the viaduct should be maintained. It would have been an act of folly for these parties to join in a contract involving the expenditure of large sums of money for the purpose of relieving themselves of the inconvenience and dangers incident to the joint use of the street, by providing for the construction of a viaduct thereon without also intending to provide for its maintenance, but the obligation to maintain could not be imposed upon the railway companies except by express provision.

But no such provision was made, hence, the city being bound under the laws, general and special, sub-

sisting at the time, to maintain all streets or parts of streets used by the public or which might be from time to time established, the duty to maintain would be necessarily assumed by it, as one of the implied obligations of the contract.

It is a universal rule that every contract is made with a view to the laws extant at the place of execution which become a part of it and by the aid of which it is to be read and expounded.

Edwards v. Kearzey, 96 U. S., 595;

Von Hoffman v. City of Quincy, 4 Wall., 535.

In the latter case, the city of Quincy had issued bonds under certain acts of the legislature which authorized the levy of a special tax to pay the interest as it fell due. Subsequently, in 1863, a law was passed restricting the power of taxation. The relator in the case had obtained a judgment on interest coupons and had applied for a mandamus to compel the levy of a tax to pay the same. The opinion of the court was delivered by Mr. Justice Swayne, who speaking with reference to the laws being a part of the contract, said:

> "It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement. Illustrations of this proposition are found, in the obligation of the debtor to pay interest after the maturity of the debt, where the contract is silent; in the liability of the drawer of a protested bill to pay exchange and damages, and in the

right of the drawer and endorser to require proof of demand and notice. These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement."

Green v. Biddle, 8 Wheat., 92;

Bronson v. Kinzie, 1 How., 319;

McCracken v. Hayward, 2 Id., 612;

People v. Bond, 10 Cal., 570;

Ogden v. Saunders, 12 Wheat., 231.

It was also held in *VonHoffman v. City of Quincy*, that where a state authorizes a municipal corporation to contract and exercise the power of local taxation, this power cannot be withdrawn until the contract is satisfied. Speaking upon this phase of the case, Mr. Justice Swayne used the following language:

"When the bonds in question were issued there were laws in force which authorized and required the collection of taxes sufficient in amount to meet the interest, as it accrued from time to time, upon the entire debt. But for the act of the 14th of February, 1863, there would be no difficulty in enforcing them. The amount permitted to be collected by that act, will be insufficient, and it is not certain that anything will be yielded applicable to that object. To the extent of the deficiency the obligation of the contract will be impaired, and if there be nothing applicable, it may be regarded as annulled. A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist. It is well settled that a state may disable itself by contract from exercising its taxing power in particular cases. *New Jersey v. Wilson*, 7 Cranch, 166; *Dodge v. Woolsey*, 18 How., 331; *State Bank of Ohio v. Knoop*, 16 Id., 369. It is equally clear that

where a state has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The state and the corporation in such cases are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the state nor the corporation can any more impair the obligation of the contract in this way than in any other. *People v. Bell*, 10 Cal., 570; *Dominick v. Sayer*, 3 Sandf., 555.

"The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The act of 1863 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if that act had not been passed. A different result would leave nothing of the contract but an abstract right —of no practical value—and render the protection of the constitution a shadow and a delusion."

It may be insisted that inasmuch as the subject matter of the contract relates to the construction and maintenance of viaducts, the railroad company cannot have such a special use thereof as to confer upon it a property right or interest within the meaning of the constitutional provisions guaranteeing the rights of private property. There can, however, be little doubt but what a corporation may have, with respect to a viaduct as with respect to a street, rights of property arising out of the peculiar relation which it sustains to its property; a right, in other words, not shared by the public and which ought to be and is as sacred from legislative invasion as is its right to the property itself.

Story Case, 90 N. Y., 122;

Lahr Case, 104 N. Y., 268;

Warren v. Lyons, 22 Ia., 351.

There are in law as well as in fact two sides to a viaduct, the *upper* and the *lower* side. The use of the public is of the *upper* side and in such use a railroad company may participate as one of the public. The use of the *lower* side however is a *special* and *particular* use, being in the railroad company over whose lines it may be located. This use is constant and important. Indeed, the greater the public use the more valuable the private use. Such use facilitates the operation of the trains across the streets. It relieves the railroad companies of the necessity of maintaining flagmen, watchmen and gates and also of the danger of accidents which may result in injury, either to persons or property. For these reasons viaducts are of special pecuniary value to railroad companies. Indeed, the authority of the state to burden railroad companies, over whose tracks viaducts are located, with their maintenance, is justified upon the ground that such companies are particularly and specially benefited by them. It follows, therefore, that where a viaduct has been constructed under a contract otherwise valid, voluntarily entered into between railroad companies on the one hand and a municipality on the other, by which the former has contributed a large portion of the cost and damages involved, in consideration of its being built and maintained by the latter, the companies thereby acquire a *vested right* not only in the viaduct but in the maintenance thereof according to the contract. Every reason

which can be urged to justify the application of this principle in case of an abutting lot owner, can be urged with greater force by the railroad companies with respect to a viaduct built under such a contract. There is and can be no reason why the legislative power of the state should be more absolute in one than in the other case. It is possible that the exercies of such powers might be *unlimited* but for the rights of private property.

There is nothing in the nature of the contract or in the obligations it imposes, which places it under the ban of public policy or in any degree whatsoever restricts either the state or the municipality from the legitimate exercise of their legislative powers over public streets.

Can it be said, for instance, that a contract is against public policy because it provides for the maintenance of a viaduct used as a part of a public street, so as to make it convenient and safe for the use of the public for street purposes, especially where it calls for an improvement universally recognized as the best and in the majority of cases, the only means to secure the result? The mere statement of the proposition involves its refutation.

Neither does the contract in the least restrict the state or the municipality from the legitimate exercise of its legislative control of streets. It is universally conceded that the legislature of the state represents the general public and possesses full and paramount

authority over all public ways including the streets of cities, and that the only restrictions imposed upon the exercise thereof are contained either in the federal or state constitutions, or incidentally imposed by those constitutional provisions which guard private property against the invasions of the state. Subject to these restrictions the legislative control of highways and streets, is practically unlimited, both as to means and extent. In the exercise thereof it is the end in view that weighs. To establish highways and streets and to provide for their maintenance and use are the essential objects. The question of means is a matter of legislative discretion, to be exercised with reference to the necessities of the community and the rights of private property.

The act of 1885 was intended and designed by the legislature to enable cities of the first class to provide for the safe use of its public streets occupied by railroad tracks by means of viaducts to be constructed and maintained under contracts between them and the railroad companies owning and operating such tracks.

As to how the street should be made safe and the cost and expenses thereof be borne, was a matter purely with the discretion of the legislature, and if in its judgment it was deemed wise to authorize certain municipalities of the state to enter into contracts with private citizens for such improvements, it certainly had the constitutional power to do so, and such contracts when executed would have the same force and effect as if made by the state itself.

The authority of the state to enter into contracts

which operate even to restrain the exercise of some of its most important powers, has been sustained by the supreme court of the United States in a large number of cases. In this connection it will be sufficient to quote from the opinion of Justice HARLAN in the case of *New Orleans Gas Light Co. v. Louisiana Light, etc., Mfg., Co.* 115 U. S., 650. After briefly noticing the adjudications in the cases of

Slaughter House Cases, 16 Wall., 62;

Stone v. Mississippi, 101 U. S., 814;

Bridge Proprietors v. Hoboken Co., 1 Wall., 116;

The Binghampton Bridge, 3 Wall., 51;

West River Bridge Co. v. Dix, 6 How., 531;

Pontchartrain R. R. Co. v. Orleans Navigation Co., 15 La., 413;

Crescent City Gas Light Co. v. New Orleans Gas Light Co., 27 La. Ann., 147;

he says:

"Numerous other cases could be cited as establishing the doctrine that the state may, *by contract*, restrict the exercise of some of its *most important powers*. We particularly refer to those in which it is held that an exemption from taxation for a valuable consideration at the time advanced or for services to be thereafter performed, constitutes a contract within the meaning of the constitution."

Asylum v. New Orleans, 105 U. S., 368;

Home of the Friendless, 8 Wall., 430;

New Jersey v. Wilson, 7 Cranch., 166;

Bank of Ohio v. Knoop, 16 How., 376;

Gordon v. Appeal Tax Court, 3 Id., 133;
Wilmington R. R. v. Reid, 13 Wall., 266;
Humphrey v. Pegues, 16 Id., 248, 249;
Farrington v. Tenn., 95 U. S. 689.

Continuing, the court say:

"If the state can, by contract, restrict the exercise of her power to construct and maintain highways, bridges and ferries, by granting to a particular corporation the exclusive right to construct and operate a railroad withing certain lines and between given points, or to maintain a bridge or operate a ferry over one of her navigable streams within designated limits; if she may restrict the exercise of the power of taxation, by granting exemption from taxation to particular individuals and corporations, it is difficult to perceive upon what ground we can deny her authority—when not forbidden by her own organic law—in consideration of money to be expended and important services to be rendered for the promotion of the public comfort, the public health, or the public safety, to grant a franchise, to be exercised exclusively by those who thus do for the public what the state might undertake to perform either herself or by subordinate municipal agencies.

"The former adjudications of this court, do not declare any different doctrine, or justify the conclusion for which the defendant contends."

But the contract in question does not restrain the state or municipality in the exercise of any of its powers or control over public streets or over the viaduct in question. *It is in and of itself, an exercise of such power or control, and not in restraint of it. It secures the public safety and not the continuance of the public danger.*

The contract, being made by competent author-

ity, is therefore within the jurisdiction and protection of the federal government, unless subject to either the reserved power or to the police power of the state.

To repeat what was said by Chief Justice TANEY in *Ohio Life Insurance, etc., Company v. DeBolt*, 16 How., 428:

> "Yet if the contract (referring to the contract in that suit) was within the scope of the authority conferred by the constitution of the state, it is, like any other contract made by competent authority, binding upon the party; nor can the people or their representative, by any act of theirs, afterwards impair its obligation. When the contract is made the constitution of the United States acts upon it and declares that it shall not be impaired and makes it the duty of this court to carry it into execution. That duty must be performed."

It is, however, conceded that a state may pass laws impairing contract obligations, first, where the right to alter or annul the same has been expressly reserved; second, where the contract provides for a business which has become detrimental to the public health or morals.

In the one case the act of the legislature may be said to be an exercise of the reversed right of the state and in the other an exercise of the police power of the state. In either case, the contract is excepted from the jurisdiction and protection of the national government.

The constitution and laws of the state subsisting at the time of the organization of the Omaha and Southwestern Railroad Company, together with the provisions of the act under which it was incorporated,

unquestionably constitute a contract between the state and that company. It will not be pretended that at the time of its incorporation, any right whatever was reserved to the state to alter, amend or repeal its charter. Having, therefore, failed to reserve such right, the state cannot impose upon the company any new or additional obligations than those provided for by its charter. Even had such right been reserved it could not be exercised to impair the obligations of an executed contract such as the one under consideration.

In *Ward v. Farwell*, 97 Ill., 593, the supreme court of Illinois, speaking with reference to the obligation of charter contracts, declared that the granting of a charter by the state to a private corporation creates a contract between the state and the incorporators of such company and is no longer an open question and it will therefore be a useless occupation of time to reconsider the reasons by which the conclusion is reached. It follows, therefore, where the right to do so has not been reserved in the grant, that it is not within the power of the legislature, after the acceptance of such charter, to engraft upon it any new terms or provisions without the concurrence or assent of the corporation. See also:

Coast Line Railroad v. Savannah, 30 Fed., 640.

City of Kansas v. Corrigan, 85 Mo., 263;

I. C. R. R. Co. v. Bloomington, 76 Ill., 447.

There are many cases in which states have altered or annulled contracts or imposed new burdens

upon corporations not provided for in their charter or acts of incorporation, but in every instance the state has reserved the right to do this.

Sioux City St. Ry. Co. v. Sioux City, 138 U. S., 640;

Peake v. C. & N. R. R. Co., 94 U. S., 194;

Boston Beer Co. v. Mass., 97 U. S., 25.

The principle sustained by these causes may be illustrated by the Sioux City case, in which the facts were that the Street Railway Company was incorporated December, 1893, at the time the statute was in force reserving to the state the right at any time thereafter to alter or amend the articles of incorporation as might be deemed necessary for the public good. Immediately upon its organization the railway company acquired from the city by ordinance the right to lay and operate its tracks through the streets of the city, subject however to the provision thereof requiring it to pave between the rails of its tracks. Subsequently, under the act of 1894, the city, by ordinance, required the company also to pave the street for one foot outside of the rails and assessed a special tax against it for the cost of the paving thereof. On these facts it was held that there was no contract between the company and the state or the city, the obligation of which was impaired for the reason that under the laws of the state subsisting at the time the incorporation of the railway company, *the state had reserved the right* to alter or amend the charter of the

company and thereby impose new or additional burdens upon it.

There is, however, a class of powers known as police powers which abide with the state for the promotion of the general welfare of society. Of this class, there is a *particular police* power which is always reserved to the state, with which the state never parts, which the legislature can never sell or bargain away. It is, indeed, the only shaft in the legislative quiver that can pierce the protecting shield which the genius of constitutional government throws over the sacred rights of private property. The existence of this power in its largest sense need not be justified or explained any more than the existence of air and light and heat. It is a natural force and pervades the entire universe, moral, physical, animate and inanimate; it is an inalienable attribute of all sovereignties, human and divine; it is life and development; within its eternal grasp are held all atoms and units and in obedience to its inevitable decrees, each moves to its appointed task in the harmonious development of a divine purpose. In civil government its activity depends upon a variety of circumstances, so infinite in character and combination one may as well try to "number the clouds in wisdom" as prescribe the conditions which impose its exercise or even suggest the extent of its operation.

Indeed, the limits within which the police power of the state may be exercised without invading the domain of the national government were first clearly defined and established in 1885 by the supreme court

of the United States in a very elaborate and exhaustive opinion delivered in the case of the *New Orleans Gas Light Co. v. La. Light, etc., Co.*, 115 U. S., 650, and to which further reference will be made herein.

This brings us to consider the subject matter of this controversy solely with reference to the police powers of the state. If it be true, as stated by Chief Justice TANEY, *supra*, that immediately upon its execution every contract is acted upon by the federal constitution, then whatever authority a state may possess to legislate for the protection and welfare of society it can, under the decisions of the supreme court of the United States, pass no law in that behalf which impairs the obligations of such contract except where it be *necessary* to protect the physical or moral health of the community. This limitation, as already stated, was first announced by the federal supreme court in *N. O. Gas Light Co. v. Louisiana Light, etc., Co.* No better statement of the character and scope of the opinion in that case can be made than the following from *Black on Constitutional Prohibitions*, p. 79.

> "It appeared that the legislature of Louisiana had granted to the New Orleans Gas Light Company the exclusive right for a period of fifty years, to manufacture and distribute gas in that city by means of pipes, mains, and conduits laid in its streets, to such persons or corporations as might choose to contract for the same. A few years later the new constitution of the state was adopted, wherein it is provided that 'the monopoly features in the charter of any corporation now existing in this state, save such as may be contained in the charter of railroad companies, are hereby abolished.' Another gas company was then incor-

porated, and given the privilege of supplying New Orleans with gas. The first company thereupon sought an injunction to restrain the second company from digging up the streets of the city, for the purpose of laying its pipes, and from ascertaining any right to do so until the expiration of fifty years from the date of complainant's charter. For the plaintiff it was contended that the grant of exclusive privileges contained in its charter constituted a contract which the state was not at liberty to impair, either by subsequent legislative enactment or by a change in her organic law. It was answered for the defendant that since the supplying of the city with gas had relation to the public comfort, and, in some sense, to the public health and safety, it was an object embraced within the police power of the state, and that it was not competent for one legislature to limit or restrict the power of a subsequent legislature in respect to those subjects; consequently that the state might, at pleasure, recall the grant of exclusive privileges to the plaintiff, and that to do so, in the exercise of the police power, would in no sense impair any contract within the meaning of the Federal constitution. The opinion of the court was delivered by Mr. Justice HARLAN, who, after stating that the police power was, from its very nature, incapable of very precise definition or limitation, and that it was often taken in such a broad sense as to include all legislation and almost every function of civil government, proceeded to show that in *this* sense, its exercise must always be subject to the condition that it shall not encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land. By way of illustration, he cited cases where ordinances which interfered with the paramount authority of congress to regulate commerce with foreign nations and between the several states, were denied to be within the police power, and cases in which grants of exclusive privileges respecting public highways and bridges had been sustained as contracts, the obliga-

tion of which was protected from impairment by the states. He then reviewed the recent adjudications of the supreme court in which the extent and limitations of the police power had been pointed out, and reached the conclusion that, where reference is made to that police power which is always reserved to the state, with which the state never parts, which the legislature can never sell or bargain away, its sphere must be limited to the two subjects of the *public health* and the *public morals*. 'The principle,' says the learned judge, 'on which the decisions (in these cases) rest, is, that one legislature cannot so limit the discretion of its successors, that they may not enact such laws as are *necessary to protect the public health and the public morals*. That principal, it may be observed, was announced with reference to particular kinds of private business which, in whatever manner conducted, were detrimental to the public health or public morals. It is fairly the result of these cases, that statutory authority, given by the state under her police power to corporations or individuals to engage in a particular private business attended by such results, while it protects them for the time against public prosecution, does not constitute a contract preventing the withdrawal of such authority, or the granting of it to others.' "

The decisions referred to in this opinion and from which the court deduced its conclusions and judgment, were rendered in

Beer Co. v. Massachusetts, 97 U. S., 32;
Fertilizing Co. v. Hyde Park, 97 U. S. 663;
Stone v. Miss., 101 U. S., 814;
Butchers Union v. Crescent City, etc., Co., 111 U. S., 746.

In every one of these cases the state was under

the *pressure of absolute necessity* to choose between annulling its contract obligations or permitting the continuance of a business which the legislature had declared detrimental to either the moral or physical health of the community. The question of expense was not involved. There was absolutely no other means by which society could be protected against the injuries resulting from previous legislative engagements. Consequently, the legislation of the several states concerned was *necessary* to protect the moral or physical health of their respective communities.

In the beer case, for instance, the state of Massachusetts, having entered into a contract with its citizens by which they were created a corporation and authorized to manufacture and sell beer, and the legislature having subsequently declared the business injurious to the moral health of the community, *there was no alternative* for the state but to cancel its engagements regardless of the pecuniary loss thereby incidentally inflicted upon the property rights and interests of the individuals concerned.

In the fertilizing case, the company, under its charter, which amounted to a contract with the state, had established and was prosecuting a business which had become detrimental to the health of the community of Hyde Park. Under a subsequent act of the legislature, the city adopted measures which operated to interdict the business of the company and thereby deprive it of the use of its property. In the suit which followed, the company pleaded the protection of the federal constitution against the impair-

ment of contract obligations but the court held that the legislation involved was clearly an exercise of that particular police power of which the state could not be divested by any contract between it and its citizens. In this case, the same as in the beer case, the state had no choice in the matter. There was no other means by which it could protect the health of the community except by authorizing the municipality to adopt and enforce legislation which impaired the obligations of the contract under which the company had established its business.

These cases, as also the others referred to, establish two propositions: (1.) That the reserved right of the state must be limited in its exercise to securing the public health or the public morals. (2.) That the exercise of the right itself must be necessary to secure these objects. It is not enough that the purpose and effect of the legislative enactment may be to protect the public health or the public morals, but it must also be that such protection can be secured in no other way.

To again quote from Justice Harlan's opinion in the N. O. Gas Light Co. case, "The principles upon which the decisions in *Beer Company v. Massachusetts; Fertilizing Co. v. Hyde Park; Stone v. Mississippi*, and *Butchers Union Co. v. Crescent City Live Stock Co.* rest, is that one legislature cannot so limit the discretion of its sucessors that they may not enact such laws as are *necessary* to protect the public health and the public morals." In other words, notwithstanding the constitutional declaration to the contrary, the state

may *where it is necessary to do so*, pass a law impairing the obligations of contracts.

A viaduct over railroad tracks located across a public street may be essential to the public safety, but it *does not follow that a legislative enactment impairing the obligation of an existing contract is necessary to secure its construction and maintenance*, and any attempt therefore upon behalf of the state to establish a viaduct through such legislation, however necessary the viaduct itself may be to the public safety, would be an invasion of the federal jurisdiction unless adopted under the compulsion of state necessity.

What the federal constitution denounces is the *enactment* of any law which impairs the obligation of contracts. The language of the constitution is: "No state ....,shall pass any..... law impairing the obligation of contracts."

When, therefore, the state is brought to the bar of federal justice to answer to the charge of invading the national domain, it can only justify legislative enactments which impair contract obligations as an exercise of that power which not only abides with the state always, but which in its operation may transcend even the express authority of the federal government. The plea, therefore, involves the question how far the exercise of an authority delegated to the federal government may be defeated by the states under an implied reservation to them. Whatever difficulty there may be in defining the *boundaries* of this reservation, the *essential principles* by

which they may be located should be clearly established.

The inhibition upon the states operates upon the legislatures thereof and disqualifies them from passing any law impairing contract obligations, consequently if, notwithstanding this inhibition, a state may pass such a law, it must be by virtue of a right impliedly reserved, the exercise of which may be justified even to the extent of restricting or obstructing the use of every power granted to the national government. Such right can find support in no principle less broad than that which involves the entire compact between the people and their governments, state and federal. Indeed, this so-called reserve power amounts to nothing less than an authoritative recognition of the existence in our political system of the principle of self preservation as an active and controlling force in the administration of governmental affairs. It abides not only with the state but also with the individual, and his legal right of self-defense is but an adaptation of this principle to the requirements of his social and political obligations, so it happens that in the moment of his extremity, when social and political forces are no longer adequate for his protection, this genius which abides with him always, emancipates him from all allegiance and remits him to the possession of his natural liberty, and the use of his natural forces. The apotheosis of the citizen into the natural man can be wrought only under the *compulsion of absolute necessity*.

So, with respect to our political system, the so-

called reserve power which enables legislatures to pass laws expressly interdicted by the federal constitution or to cancel solemn engagements between the state and its citizens, though authorized by previous enactments, is an adaptation of this same principle to the necessities and obligations of the state. There is something which runs not only through every legislative enactment but also in every line of the sacred instruments by which the people have established their institutions and in which they have provided for the distribution of their sovereign powers, we call the spirit of our institutions. It is nothing less than the instinct of self preservation, the exercise of which in society is limited and controlled by positive institutions and laws. In the case of the individual it is asserted only through the use of brute force; in that of the state, always through the observance of established principles. The life of a man may be preserved by physical force; the life of a people through the maintenance of the *principles of judicial construction.* In either case it is a matter of supreme necessity.

When the state commands the citizen to sacrifice his personal rights or private property to serve the public interest, the sovereign command must originate in a supreme necessity and issue only in the cause of an imperiled community.

Can it be said, as it certainly must be if the defendant in error's contention be sustained, that the legislation in question originated in the necessity of the state; that to secure the public safety it was *necessary* to cancel the contract between the state and the railroad companies providing therefor, in other words, that the

path to the viaduct lies only amid the *fragments of dishonored municipal obligations*?

Can a more striking contrast be presented between the several sets of facts involved in the cases of the *Beer Co. v. Massachusetts*, the *Fertilizing Co. v. Hyde Park*; *Stone v. Mississippi*, and the *Butchers Union v. Crescent City*, reviewed by Justice Harlan in his opinion, *supra*, and the circumstances presented here? Was not the contract itself, under which the viaduct was constructed and is to be maintained, entered into solely for the purpose of securing the public safety and will not the performance of the obligations thereby assumed accomplish every purpose and secure every result which can be realized through the exercise of the police power of the state? No question is here raised as to the *capacity* of the viaduct nor can it be contended that if it be repaired *by the city, as required by the contract, it will not be just as convenient and safe as if repaired by the railway companies acting under compulsion of the police power.* Does not the municipality possess all the resources and powers possessed by the railway companies to enable it to perform the obligations of this contract? This case presents no considerations, such as were presented in the cases above referred to. *The business of maintaining viaducts has not become a public nuisance.* Indeed, the very act which the city invokes in aid of this proceeding approves and seeks to command their construction and continuance.

In his opinion in the New Orleans Gas Light case, and speaking with reference to the circum-

stances involved in that controversy, Mr. Justice Harlan says:

> "The present case involves no such considerations. We have seen, the manufacture of gas and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in which everyone may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity for which the state may make provision. *It is one which, so far from affecting the public injuriously*, has become one of the most important agencies of civilization for the promotion of the public convenience and the public safety."

Again, he says, speaking of the contract itself: "It is not in any *legal* sense to the prejudice of the public health or the public safety." The decision in this case establishes the principle that the execution of a contract between the state and its citizens, though *operating to create a monopoly in a business necessary to the public welfare and in a sense to the public health and safety*, could not be defeated by a subsequent legislative enactment; that such enactment could not be justified as an exercise of that particular police power which always abides with the state for the protection of the moral or physical health of the community.

It should be noticed that the circumstances which assisted the judgment of the court in the case, and to which its reasoning was applied, gave a much stronger support to the contention of the state than the relator can gather to its aid from the exhibits and proofs presented by the record herein.

SECTION 48 AND CITY ORDINANCE NO. 3752 CARRYING ITS PROVISIONS INTO EFFECT, IMPAIR THE OBLIGATIONS OF THE CHARTER CONTRACT BETWEEN THE STATE AND THE PLAINTIFF IN ERROR.

The Omaha and Southwestern Railroad Company—the predecessor of the plaintiff in error—was organized in 1869 (rec. p. 50) under the act of 1866 providing for the incorporation of railroad companies. Section 83 of this act provided:

"If it shall be necessary, in the location of any part of any railroad, to occupy any road, street, alley or public way or ground of any kind, or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authorities owning or having charge thereof, and the railroad company, to agree upon the manner, and upon the terms and conditions upon which the same may be used or occupied; and if said parties shall be unable to agree thereon, and it shall be necessary, in the judgment of the directors of such railroad company, to use or occupy such road, street, alley or other public way or ground, such company may appropriate so much of the same as may be necessary for the purposes of such road, in the same manner and upon the same terms as is provided for the appropriation of the property of individuals by the eighty-first section of this chapter."

Subsequently in 1884, upon the application of the plaintiff in error, under the name and style of the Omaha and Southwestern Railroad Company, the right to locate its track across Eleventh street was granted to it upon the terms and conditions expressed in ordinance 729, as follows:

Section 2. "Said Omaha and Southwestern Railway Company

shall have the right to construct, maintain and operate a line of railroad along, upon, through and across said portion of said streets and alleys as a part of its line; provided, that said railroad track and tracks are constructed so as to conform to the grade of said streets as near as may may be, and so as to interfere as little as possible with the travel along and upon said streets; and provided, that nothing herein contained shall be construed as interfering with the right of any property owner to recover from said company any damages resulting to private property by reason of the construction of said railroad, and nothing herein granted shall authorize any interference with the tracks of the Union Pacific Railway Company, now laid and operated by said Union Pacific Railway Company in any portion of the streets and alleys herein named and enumerated."

It is not claimed that at the date of the organization of the company, there was any constitutional provision or public statute in force reserving to the state the right to alter, amend or repeal the charter of the company, unless such right be established by section 103 of the act of incorporation, which reads:

"Every railroad corporation shall maintain and keep in good repair all bridges, with their abutments, which such corporation shall construct, for the purpose of enabling their road to pass over or under any turnpike, road, canal, watercourse or other way."

But this section read with sections 83, 86, 101, 102, 103 and 106 (post. p. 104, 105) clearly indicates a purpose to provide only for the maintenance of "bridges with their abutments" outside the limits of municipalities and built by the railroad companies "in the construction of their lines." The obligation, therefore, imposed upon the state and the railroad company by

the charter and ordinance contracts must, under the federal constitution, be held inviolable except where it may be necessary to pass a law impairing them for the purpose of securing the moral or physical health and safety of the community.

That the maintenance of the viaduct is essential to the safety of the community is not questioned. It is, however, insisted that if existing contract obligations devolve this burden upon the city, the legislature of the state cannot, under the plea of public necessity, pass a law imposing it upon the plaintiff in error, without bringing the act within the prohibitions of the federal constitution. There is a wide difference between the enactment of a law which originates in a public necessity, and the enactment of one which can be justified only on the ground of public economy.

In his brief, the opposing counsel has inserted a paragraph from the opinion of this court in *New York and New England Co. v. Bristol* with the assurance that it disposes of this contention of the plaintiff in error, but in that case, the state of Connecticut had reserved the right to amend the charter of the railroad company, and the state supreme court had held that the statute under consideration operated as an amendment. In view of these circumstances, the declaration contained in the paragraph may well be taken as a statement in general terms of the result of the adjudications in the cases cited in that connection rather than a determination of any issues involved in that controversy.

These cases certainly establish the principle an-

nounced, but the legitimate exercise of the "legislative power in securing the public safety, health and morals" and "governmental regulation in particulars essential to the preservation of the community from injury" *imply legislative necessities* as well as state and municipal conveniences and economies.

In *Beer Co. v. Massachusetts*, *Fertilizing Co. v. Hyde Park*, *Stone v. Mississippi*, *Butchers Union v. Crescent City*, *Barbier v. Connely* and *Mugler v. Kansas*, *the state was under the pressure of absolute necessity to pass laws which in fact impaired the obligations of existing contracts.* The physical or moral security of the communities could not be secured by the enactment of laws that would not impair such obligations, thus the expressions "the legitimate exercise of legislative power in securing the public safety, health and morals" and "governmental regulation in particulars essential to the preservation of the community from injury," are to be read as equivalent to a declaration by the court, that the enactment of particular laws, and not merely the improvements or devices which they may provide for, must be necessary. Indeed, in *New Orleans Gas Light Co. v. Louisiana Light Co.*, cited in the paragraph, this court declared the principle upon which the decisions in these cases rest, to be "that one legislature cannot so limit the discretion of its successors that they may not enact such laws as are necessary to protect the public health and the public morals."

The case of *Budd v. New York*, is also cited in the paragraph, but that case simply affirmed the doc-

trine of *Munn v. Illinois*, and did not involve questions touching the preservation of the community, nor were the source and extent of legislative authority to enact laws impairing contract obligations examined or determined in that controversy. Whatever may be the merits of this particular contention, it is submitted that in none of these cases has it been settled by the adjudications of this court.

It is, however, claimed by the plaintiff in error, that if the state is without reserved legislative power over the charter of the company, it cannot under the guise of the police power, impose upon it the extra cost and expense incident to the construction and maintenance of a more expensive crossing than the one expressly provided for in the contract under which its track was located across Eleventh street.

In rendering their opinions in this case, the state courts rest their judgments upon the doctrine that the legislative control over the crossing in question is absolute and that whatever obligations with respect thereof may have been imposed by the contracts between the state, or the municipality upon the one hand, and the railroad company upon the other, it is competent for the state, through the exercise of its police powers, to compel the company to build and maintain at its own expense, such crossing as in the legislative or municipal judgment may be deemed necessary for the public safety.

With respect to this contention, counsel for the company has attempted no more than to distinguish

the cases cited, from the case at bar, and to state briefly the views which, upon a later hearing, he hopes may be abundantly fortified by reason and authority; and with respect to the entire field of dispute it may be suggested that at least some of the questions are as unique in character as the legislation in which they originate and therefor may not be silenced by a motion which can find no other encouragement than an array of authorities either irrelevant to the matters in issue or that clearly sustain the contentions of the plaintiff in error.

CHAS. J. GREENE,
For Plaintiff in Error.

Excerps from the Nebraska Act of 1866 providing for the Incorporation of Railroad Companies. Rev. Stat. of Neb. 1866, pages 213–232:

* * * * * * * * *

"SEC. 83. If it shall be necessary, in the location of any part of any railroad, to occupy any road, street, alley, or public way or ground of any kind, or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authorities, owning or having charge thereof, and the railroad company, to agree upon the manner, and upon the terms and conditions upon which the same may be used or occupied, and if said parties shall be unable to agree thereon, and it shall be necessary, in the judgment of the directors of such railroad company, to use or occupy such road, street, alley, or other public way or ground, such company may appropriate so much of the same as may be necessary for the purpose of such road, in the same manner and upon the same terms as is provided for the appropriation of the property of individuals by the eighty-first section of this chapter."

* * * * * * *

"SEC. 86. Any railroad company may construct and carry their railroad across, over or under any road, railroad, canal, stream or water-course, when it may be necessary in the construction of the same; and in such cases said corporation shall so construct their railroad crossings as not unnecessary to impede the travel, transportation or navigation upon the road, railroad, canal, stream or water-course so crossed. Said corporation shall have the right to change the channel of any stream or water-course from its present location or bed, whenever it may be necessary in the location, construction or use of their said road, provided they do not change its general course, or materially impair its former usefulness."

* * * * * * *

"SEC. 101. Any railroad corporation may raise or lower any

turnpike, plank road, or other way, for the purpose of having their railroad pass over or under the same; and in such cases said corporation shall put such turnpike, plank road or other way, as soon as may be, in good repair."

"SEC. 102. Every railroad corporation, while employed in raising or lowering any turnpike or other way, or in making any other alterations, by means of which the said way may be obstructed, shall provide, and keep in good order, suitable temporary ways to enable travelers to avoid or pass such obstructions."

"SEC. 103. Every railroad corporation shall maintain and keep in good repair all bridges, with their abutments, which said corporation shall construct, for the purpose of enabling their road to pass over or under any turnpike, road, canal, water-course or other way."

* * * * * * *

"SEC. 106. When any person owns land on both sides of any railroad, the corporation owning such railroad shall, when required so to do, make and keep in good repair one causeway or other adequate means of crossing the same."